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THE COLLECTED PAPERS
OF
JOHN BASSETT MOORE

IN SEVEN VOLUMES

V

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PAPERS OF JOHN BASSETT MOORE

ADDRESS OF WELCOME TO MEXICAN EDITORS¹

MORE than a generation ago a celebrated public speaker startled his audience by declaring that the days of oratory were over. When he made this declaration, he had been translated from the bar to the lyceum; but, as the change was understood to have been dictated solely by personal taste and convenience, the declaration was not supposed to imply that the receipts of the box office were less copious and refreshing than the fees of the advocate. The speaker, however, soon relieved the apprehensions of his auditors by explaining that, in his opinion, the power and charm of the spoken word must eventually succumb to the insistent, persistent power of the press, working ceaselessly, by day and by night, in the dissemination of news and the creation of public sentiment.

To-day we seem to stand in the very presence of that all pervasive force to which statesmen bow, and to which orators, if awed into silence, pay mute obeisance; for we are assembled to do honor not to a single representative, but to a score of representatives of the great profession that holds in its keeping the issues of war and peace and daily disposes of the lives, fortunes and reputations of men.

But, while we are ourselves thus greatly honored, we are also deeply gratified; and our gratification is not exclusively connected with any consideration of profession or occupation. Although we are accustomed to meet at our gatherings citizens of all the American countries, this is the first occasion

1. In the summer of 1918 twenty prominent Mexican newspaper editors made a tour of the United States as the guests of the Government. Arriving on Tuesday, June 4, at New Orleans, they were welcomed by the mayor of the City, and a reception was given to them by the New Orleans Association of Commerce. They subsequently visited Washington, New York, Boston, Buffalo, Detroit, Chicago, Seattle, San Francisco and Los Angeles, besides paying incidental visits to other places which were notable as seats of commerce and industry.

On their visit to New York they were entertained by the Pan-American Society at the Bankers' Club on Thursday, June 13. About 150 guests were in attendance, including some of the best-known figures in business, financial and literary circles, as well as prominent persons in the diplomatic world. The occasion was described as "one of the most animated, brilliant and sympathetic ever attended by Latin Americans and their northern friends." The address of welcome on the part of the Society was made by John Bassett Moore. Reprinted from *The Pan American Society*, July, 1918.

in recent days on which we have had as our special guests of honor, citizens and representatives of the Republic of Mexico; and in saying that their presence is a cause of deep gratification, I know that I but express the heartfelt sentiment of every person present.

Pan Americanism is frequently spoken of as something of artificial creation. In this statement, although it usually is uttered as a reproach, there is a substantial element of truth. The things we desire and ought to desire, and even the things by which we live, by no means always grow spontaneously. Too often the chief product of the fields, if the soil is left to itself, is weeds. The main objects of our solicitude are obtained only by care and cultivation. So it is with Pan Americanism. Like all other forms of association, national and international; like even the fundamental unit of society itself, the family, it presupposes the existence of a good understanding, in the preservation of which, as we are daily reminded, the exercise of tact and sound judgment is always helpful. But, above all and before all, it presupposes the existence of a spirit of real friendliness, which seeks to preserve, to stimulate and to strengthen good-will by mutual kindness and reciprocal adjustments. We wish nothing more than that the Pan American Society of the United States shall be regarded as a standing manifestation of that purpose.

Until human nature shall have undergone a radical change, which very hopeful persons in all ages have supposed to be imminent but of which there is as yet no visible sign, differences will continue to arise between nations and within nations, just as they arise between and within individual men; for, so marked is the tendency of men to differ even with themselves, that consistency has been declared to be a jewel. But, while differences will continue to arise, it is our duty to see to it that they do not grow and accumulate, thus creating estrangement between those who should remain friends. It is a matter of common experience that, when differences are candidly recognized and examined, they are found to be less substantial, or at any rate less difficult to remedy, than had been supposed, and that the ties of mutual friendship and mutual interest, confirmed by time and beneficial intercourse, are essentially unimpaired.

The word "America" conveys a sentiment, but it conveys something more. It brings to memory cherished associations. It recalls days of struggle and of stress through which all the independent countries of America have alike passed; days in which, as was said of the founders of the United States, the American nations, unless they should hang together, were

likely to "hang" separately. In the present, as in the past, it is a summons to harmony. May it continue to be a pledge of unity in the maintenance of a common heritage of interests, aspirations and ideals.

So saying, I extend the right hand of fellowship to our guests from the Republic of Mexico, and ask you to rise and drink their health, in token of that concord and mutual understanding which we wish always to pervade the relations between two peoples who are unalterably neighbors and should ever be friends. (*Loud applause.*)

ADDRESS OF WELCOME TO DR. BALTASAR BRUM, MINISTER OF FOREIGN RELATIONS OF URUGUAY¹

THE Pan American Society of the United States does well to take part in the welcome extended by the City of New York to the Minister of Foreign Relations of the Republic of Uruguay and his associates, now visiting the United States as the guests of the nation. The "freedom of the city" has already been officially extended to this important special mission by His Honor, the Mayor, whom we are happy to have with us on the present occasion; and we feel deeply grateful that next in order there has been accorded to us the privilege of bringing our distinguished guests into relations with so many eminent representatives of the governmental, commercial, industrial, financial, and social life of this metropolis. Of this gratifying recognition of its position and functions the Pan American Society finds an explanation in the circumstance that the City of New York acts and speaks to-day not only in its corporate capacity, but also in the capacity of a representative of interests at once national and international, and above all of that spirit of fraternity which it desires to foster as the surest bond of union among the American nations. We may readily admit that it was a tendency to rhetorical exaggeration that led a famous writer to say that when an Indian brave on the shores of Lake Winnipeg quarrelled with his squaw the whole civilized world felt the effects. But it is not extravagant to say that when the great municipalities in which the complex activities of our age so largely center express their sentiments the world rightly takes notice.

1. Delivered at the luncheon of the Pan American Society of the United States, August 30, 1918. Reprinted from *The Pan American Society of the United States*, No. 4 (September 18, 1918).

It would be superfluous to assure our honored guests of the high esteem in which we hold their country; for, while it is exceeded by some of the American nations in area and in population, it competes with the best of them in the pursuits which tend to make a prosperous, happy and contented people. With an energetic development of its natural resources, it has combined an idealism which has found expression in the adoption of measures of internal legislation as well as in the origination and advocacy of measures designed to widen the bounds of international co-operation. While commerce and industry have been encouraged, popular education has been disseminated with the greatest zeal and liberality. Speaking from my own personal experience, I may say that one of the most interesting and most beautiful spectacles I ever witnessed was the celebration some years ago of the annual closing exercises of the public schools of Montevideo.

Among the things for which Pan Americanism is supposed to stand is the mutual recognition of rights and the cultivation of liberty regulated by law. To this conception the Republic of Uruguay has paid conspicuous tribute. Not only has she produced eminent statesmen, but she has given to the world scholars deeply versed in jurisprudence. I have often mentioned, as a fine example of learning, of virtue, and of usefulness, the late Gonzalo Ramírez; and with his honored name I would couple that of the late Uruguayan Minister at Washington, Dr. de Pena, who labored so unceasingly in the cause of American unity. To men of this type was due the keen appreciation so signally manifested in Uruguay, of the advantages that would accrue from the harmonizing of different systems of law and procedure. When the celebrated conference was held in South America in 1888 for the purpose of bringing about an international agreement on certain fundamental questions of private international law, Montevideo was fitly chosen as the place of meeting; and some of the most important documents laid before the first International American Conference, in Washington, in 1889, were discussed and matured in the Montevideo conference of the preceding year.

I have heretofore adverted to the spirit of American fraternity. Of this sentiment there have been in the relations of Uruguay with the United States many striking manifestations. Happily, we are not obliged to explore the record of the past in order to find them. We shall not soon forget the reception given at Montevideo last year to the squadron of Admiral Caperton, not only because of its spontaneous cordiality, but also because of the remarkable Pan American declaration

which marked the occasion. While there was a great popular outpouring, in demonstration of sympathy with the Republic of the North in the great struggle in which it was and still is engaged, the President, by a vote of the Cabinet, and with the concurrence of the Senate, issued a proclamation, by which it was declared that, whereas the Uruguayan Government had announced the principle of American solidarity in the sense that offences against the rights of any country of the continent were to be regarded as offences by all, no American country which, in defense of its rights, was in state of war with nations of another continent should be treated as a belligerent.

Verily, the cause of Pan Americanism advances. Facing the future not only with hope, but also with confidence, we see in the presence to-day of our brethren from Uruguay yet another pledge of American solidarity; and in token of this sentiment I ask you to rise to the toast of their health and happiness and of the progress and prosperity of their country.

INTRODUCTION TO THE LIFE OF HAMILTON FISH¹

THE author of the present sketch has asked me to contribute an introductory word. My interest in his subject has induced me to comply.

Upwards of forty years have elapsed since Hamilton Fish relinquished the post of Secretary of State, and, on the verge of his seventieth year, ended his public career. When drafted into the cabinet of Grant, it was twelve years since he had held public office. Prior to that interval, he had served as a member of the national House of Representatives; as Lieutenant-Governor, and then as Governor, of his native State; and as a Senator of the United States. He had neither extolled his own virtues, nor sought popular favor and admiration by rhetorical efforts. In the Congress he had made no speeches; and in the various official positions he occupied his activities, so far as they found formal expression in words, were recorded in grave State papers which comparatively few persons ever saw and still fewer cared to read.

Nevertheless, in his day and generation he enjoyed an exceptionally large measure of public confidence. As a trustee of ecclesiastical, educational, and benevolent institutions, to

1. Reprinted from *Hamilton Fish* by A. Elwood Corning (New York, The Lanmere Publishing Company, 1918), pp. 7-9.

which, when not in public life, he gave much of his time and thought; as the associate and adviser of men of affairs and men of business, of men who desired sound and stable conditions rather than opportunities for adventure, he was held, by reason of his breadth of view, sureness of judgment and practical capacity, in the highest esteem. These respect-compelling qualities he carried into public office, where, united with a keen sense of honor and strict integrity, they enabled him to advance the general welfare and to elevate the standards of service.

In the administration of the foreign affairs of his country, he achieved his greatest usefulness. He undertook the task at a critical time, when many difficult questions were pending, and when intelligence, experience and steadiness were peculiarly requisite. Some of these questions antedated the Civil War, but others were of later origin, while the most important and most menacing of all, that of the so-called Alabama Claims, arose out of that great conflict.

In the treatment of these complications, Hamilton Fish was an opportunist only in the sense that he "took occasion by the hand." His aims were clear and definite, and were steadily pursued. His prime objective was peace with reciprocal justice. In his adherence to this noble and practical ideal, he had his official chief's full and loyal support. It is true that the particular measures he recommended were not invariably those that most strongly appealed to the President; but, as events vindicated his wisdom, Grant, who was peculiarly free from vanity and egotism, deferred to his judgment and trusted him more and more.

Fortunately, he was thus enabled to complete his work. I cannot undertake now to pass it in review. But I will say that the Treaty of Washington of May 8, 1871, for the settlement of all controversies then pending with Great Britain, stands out as the most comprehensive international adjustment in our diplomatic annals. The Geneva Tribunal, for which it provided, still presents the high-water mark of international arbitration. As our retrospect lengthens, the more clearly do we see that the treaty of 1871 was the turning point in the relations between the two countries. Regarding it as a great historic monument, if I were asked to select, from among its conscious builders, the name most worthy to be inscribed upon it, as that of its chief designer and creator, I should not hesitate to designate the name of Hamilton Fish.

September 9, 1918.

THE INTERNATIONAL SITUATION¹

NOT long after the Young Turk Revolution, some of the incidents of which I had personally witnessed, a friend asked me if I could explain why the expectations formed of the movement and of its regenerative effects had been so largely disappointed. I at once replied that the explanation lay in the simple fact that the population of Turkey was the same the day after the revolution as it was the day before.

In spite of the evident continuity of the fundamental conditions of human existence, it seems to be very easy in moments of emotional exaltation to indulge the superficial assumption that those conditions have suddenly and radically changed, and that we are dealing with a world altogether new. This tendency is greatly facilitated by the general lack of knowledge of what has gone before, a lack often strikingly displayed even by professed historians, who, while minutely detailing names, dates, and events, may remain unconscious of the workings of human psychology, and, preoccupied with changing forms and phrases, may fail to perceive the persistent resemblance of the essential causes of the struggles through which men and nations have passed.

Among the assumptions of novelty now so generally prevalent is the oft-repeated supposition that the present world conflict is both different from and far greater than any that ever before occurred. In the sense that more men are actually under arms, that larger sums of money are spent, and that the destructive devices employed are more varied, this supposition is correct. But all such things are to be viewed relatively. According to the Mosaic account of the creation, if at that early stage only one person, Eve, had died childless, the results to the human race would have been disastrous. As the result of increased populations and measures of conscription, larger numbers of men are now under arms than in previous wars, but, if the effects be considered, we must admit that none of the parties to the present conflict has as yet suffered the relative loss that the German states did during the Thirty Years' War or that France did before the close of the Napoleonic wars. We are told that the wars growing out of the French

1. Reprinted from *The Nation*, Vol. CVII, No. 2779 (October 5, 1918).

Revolution and the Napoleonic Wars, which together lasted almost a quarter of a century, materially reduced the average stature of the French, while, in the course of the Thirty Years' War, three-fifths of the population of Germany perished, and devastation was carried to a point never since approached.

Another prevalent supposition is found in the daily reiterated statement that a far larger part of the world is involved in the present war than in any previous international conflict. This statement is made in spite of the fact that all Europe was involved in the Napoleonic Wars; that Spain was then a battleground; that the national existence of the Netherlands was for a time even suppressed; that Scandinavia and Switzerland were swept into the vortex; that Africa did not escape; that, after the United States declared war against Great Britain in 1812, all the American continents were implicated; and that the struggle was also carried on in the Far East.

In reality, just as the resettlement of the surface of the earth from time to time produces earthquakes, so the readjustment of human affairs has from time to time produced armed conflicts. At the present moment the world is passing through a period of political readjustment such as previous centuries have often witnessed. Nations rise and fall. A particular Power reaches a position where its strength and aggressive tendencies excite the apprehensions of other Powers. Coalitions are formed. Competition becomes keener. Rivalries become sharper and are pushed more relentlessly and with less and less regard for consequences. Feelings are stirred; animosities become more intense, and eventually something happens that precipitates a break. War ensues, and in the conflict that follows even the party that precipitated the collision professes to regard itself as acting upon the defensive.

Another very prevalent fallacy may be found in the assumption that the conditions of international life have been radically changed by improved means of transportation and communication; but here again, as in all matters, the principle of relativity must be applied. Steamships, telegraphs, and telephones are not the monopoly of any nation, and previous centuries have had world-wide wars without any of those devices. While it took longer to reach a certain point, the belligerents were in this regard on the same footing; and the fact that it took a month or six weeks instead of ten days to go from one point to another did not deter the belligerents from making the transit. It has been said that during the Seven Years' War men fought in Saxony for empire in America; but Europeans then fought each other in America and also in the Far East for empire in those quarters. The British fought Spaniards in Ha-

vana and in Manila and fought Frenchmen in the West Indies and in Bengal. A handful of troops settled the fate of India. The area of the great struggle that began thirty years later embraced the entire globe. A dominant motive on the part of Napoleon in ceding Louisiana to the United States was to prevent the British from seizing it. After the lapse of a decade Americans fought Englishmen in New Orleans, and when the Treaty of Ghent was signed British troops held various places within the boundaries of the United States. The termination of the Napoleonic wars involved territorial and political changes in all parts of the world.

The conditions of essential importance as affecting the present international situation are, as heretofore, political rather than physical. In other words, the important question is not whether it takes seven days or seven weeks to make a voyage between the United States and Europe, but the question whether the voyage is made for a political or non-political purpose. The United States is often spoken of as having heretofore occupied a position of "isolation," in the sense of lacking power and influence. The term is misleading. To speak of a great trading and immigrant-receiving country; a country which has opened distant empires to commerce; a country which has for a hundred years claimed to hold in its watch and ward the political destinies of the Western Hemisphere, as an "isolated" Power, is a manifest absurdity. When Lord Salisbury twenty years ago spoke of Great Britain's "splendid isolation," he was not understood to mean that Great Britain had ceased to be a great Power, but merely to assert that her freedom at the time from political alliances had, in his opinion, the effect of strengthening rather than of weakening her international position and influence.

The conception of isolation, so far as it concerns the United States, is justified only in so far as it denotes the fact that the United States has heretofore, as a matter of national policy, for the most part avoided political arrangements or alliances with other countries. Up to a recent day this was regarded as a permanent feature of national policy; but we may admit that it was a policy that rested upon the conceptions of statesmen rather than upon popular impulse or reflection. With its establishment the names of Washington and Jefferson are pre-eminently identified; but there were, no doubt, many occasions when it would have ceased to guide the destinies of the United States if popular impulse had been consulted. We little appreciate to-day the situation of the United States in the years immediately succeeding the establishment of independence, and especially after the outbreak of the wars growing out of the

French Revolution. While the conservative elements, whom war had not wholly alienated from the mother country, were opposed to our becoming implicated in that struggle, there can be no doubt that the popular sympathy with France was widespread and demonstrative; and the hazards of the situation were immensely increased by the political alliance with France which still existed. Less than fifteen years after the close of the Napoleonic Wars, a gentleman in the western part of the State of New York, referring to the popular agitation then in progress in the United States in favor of the Greeks in their struggle for independence, declared that he could, from his sparsely settled region, furnish "five hundred men six feet high with sinewy arms and case-hardened constitutions, bold spirits and daring adventurers who would travel upon a bushel of corn and a gallon of whisky per man from the extreme part of the world to Constantinople," to aid the Greeks in their struggle. The demonstrations of sympathy in the case of Hungary and Kossuth twenty years later were far more general and pronounced. Conservative men were naturally alarmed, and perhaps were not unjustified in thinking that a policy of intervention, if espoused by those higher in authority, would receive a tumultuous popular support.

In view of these antecedents it is not without reason that eminent Senators have already been led to discuss the question whether considerations of foreign policy and of political alliances will not hereafter play a large part in our electoral campaigns. There is no doubt that this would be the case if the popular interest in questions were always proportioned to their importance. But there are few countries in which the public uniformly exercises an appreciable judgment upon or control over foreign affairs. The popular mind is more likely to be preoccupied with questions obviously affecting the fundamental conditions of daily life, such as food and raiment, taxation and transportation, tariff and finance. That questions of political alliance would continuously excite and hold popular interest because of general principles involved or conjectural future effects is a supposition which experience does not justify. On the other hand, because foreign complications so readily arouse national feelings and suggest the thought of war, there is always the possibility that an international question may overshadow all other issues in a political campaign.

Proposals and demands are now constantly heard for a league of nations to prevent the recurrence of wars. The circumstance that such thoughts are among the invariable concomitants of a great conflict by no means justifies their rejection; but the fact that, after centuries of aspiration and of

effort, they still remain substantially unrealized, may suggest the necessity of subjecting particular plans to intelligent examination. In the United States the idea of a league of nations has been most actively urged by the "League to Enforce Peace." But, while this organization has adopted a definite programme, its adherents apparently are not in accord on at least one vital point, since some of them have indicated that their object would be attained by a league embracing the Allies and their associates in the present conflict. It requires little reflection to show how defective this conception is. Such a combination could be called a league to enforce peace only in the sense in which the numerous previous alliances during the past thousand years, styled "Grand," "Holy," or otherwise, and professing as their object peace, justice, and security for the rights of all nations, might have been so denominated. Certain nations, having confidence in the purity and benevolence of their own purposes, have repeatedly associated themselves for the purpose of preventing other nations, whose aims and motives they distrusted, from carrying out the evil designs imputed to them. Surely there is nothing inherently wrong in such a combination; but the elevated title assumed by the members of the group is regarded by the nations outside of and opposed to it as an entire misnomer. In reality such a league represents nothing more than the venerable and somewhat instinctive idea of balance of power, and cannot be regarded as introducing a new world-order, such as is contemplated in President Wilson's proposal for a league of nations.

The platform of the "League to Enforce Peace" does not commit it to the group plan; nor yet does the platform necessarily exclude such a measure—a circumstance much emphasized by the eminent Chilian publicist, Dr. Alejandro Alvarez, in a searching examination of the League's programme. Dr. Alvarez is now Secretary-General to the American Institute of International Law, a Pan-American organization formed under the auspices of the Carnegie Endowment; and his examination appears as an appendix to the report, which is published only in French, of the proceedings of the Institute at its second meeting at Havana. His conclusions, which are adverse to the League's plan, will no doubt have great weight, especially in Latin America.

In the countries of Europe the idea of a league to "enforce" peace has not made striking headway. It is true that eminent statesmen have spoken of it in approving terms, but it would be a mistake to ascribe too much weight to such utterances, unless interpreted in the sense of a political alliance intended to assure a preponderance of power. In England, the proposal

has been discussed both favorably and unfavorably, but with an adverse or skeptical tendency on the part of those who adopt the historical method. An attitude extensively prevailing out of doors may be reflected in a debate in the House of Commons on July 17, 1918, as reported in the London *Times* of the following day (p. 10, col. 2). The discussion ran as follows:

Mr. Bonar Law, Chancellor of the Exchequer (Bootle, U.), replying to Sir W. Dickinson (St. Pancras, N.L.), said that it would not be possible to give a day for the House to discuss a motion approving the principle of a League of Nations before the adjournment.

Sir W. Dickinson asked whether, the Government having stated that they associated themselves whole-heartedly with President Wilson's plan to create a League of Nations, it would not be desirable to obtain the support of the House of Commons to that policy. Mr. Bonar Law.—Yes, Sir, but it is a question of giving a day before the adjournment, and I do not see how that is possible. Sir E. Carson (Dublin University, U.).—Is there anybody who opposes the League of Nations? Mr. Bonar Law.—I have met no one who opposes it. Lieutenant-Colonel Lord H. Cavendish-Bentinck.—Does any one in this country really know what the Government means by a League of Nations? Mr. Bonar Law.—I hope every one in this country knows as clearly what the Government means as what any one else means. [Laughter.] Mr. A. Williams (Durham, N.W., L.). Is the rt. hon. gentleman aware that there is a strong feeling in the country that the Government have not made their position clear on this matter? Mr. Bonar Law.—I do not think there is any justification for that feeling. Mr. H. Samuel (Cleveland, L.) asked if the rt. hon. gentleman's answer implied that neither the Government nor any one else really understood what a League of Nations was, and, if that was so, was it not desirable that steps should be taken at once to explore the whole subject and come to a definite opinion. Mr. Bonar Law said his answer did not imply anything of the kind. He added if there was a general desire for a discussion he would try to give a day, but he did not think it was necessary before the recess. Mr. Pringle suggested that there were already two sects in this new faith, and that it was important to prevent further heresies. Mr. Bonar Law.—I have never found that a discussion in this House got rid of any heresy. [Laughter.]

The conception of a world-league can hardly be expected to make rapid progress in France while the thought so widely prevails there of a "war after the war" in an economic sense; nor should we forget that wars give a strong impulse to the spirit of nationality, which preëminently characterizes the French people. A league to "enforce" peace on all the members would necessarily involve a material concession from views heretofore maintained as to national sovereignty. Moreover, it is not improbable that the vast debts created by the present war will tend to stimulate commercial competition and to en-

courage the adoption of discriminatory tariffs. In addition to this, a great impetus probably will be given to the establishment within colonial empires of the policy of internal trade preferences, thus constituting vast trading units and to a certain extent restoring, especially if most-favored-nation clauses be abandoned or narrowly interpreted, the system of commercial exclusion on which the wars of the eighteenth century so largely turned.

In a remarkable address at the adjourned general meeting of the Cunard Steamship Company, at Liverpool, on the 17th of July last, the chairman of the company, Sir Alfred Booth, Bt., in an enumeration of the principal dangers which he expected to follow the war, mentioned the following:

(3). An attempt to place in the hands of some international authority the task of dividing up the raw materials of the world among all competing industries. This means making politics and not price the determining factor of distribution. The international jealousies engendered by such a system would be quite sufficient to kill any League of Nations we might have hoped to form.

The distinguished chairman evidently did not speak without reflection.

At the moment there are no definite signs that the present great conflict will be followed by conditions that make for friendship and tranquillity. In May, 1914, I ventured the statement, the grounds of which were duly set forth, that the boasts often heard, of the great advance, in recent years, in the practice and conception of international arbitration were not justified by the facts. This statement was characterized as "pessimistic," but its substantial accuracy was strikingly confirmed by what happened before the end of the summer. Those who were then "optimistic" now clamor for a "governed" world, as a panacea for the ills to which humanity has heretofore been subject. But the remedy is not new nor is the demand novel. Since the dawn of recorded history men have been trying to have a "governed" world, but unfortunately have fought over the question who should govern it. Racial feelings, different political conceptions, varied and conflicting economic needs and ambitions have impelled and still impel them to do so.

As to the manner in which the war will be brought to a close, there seems to be a certain confusion, if we judge by current phrases. We hear much of a "negotiated" peace as the antithesis of a "dictated" peace. Those who use these phrases would, if called upon to justify them, find difficulty in so doing. No doubt what they usually mean by a "negotiated" peace is a peace founded on a compromise or bargain, in which certain conditions which they wish to see maintained would be sacrificed or

abandoned; but, for such a thought, the word "negotiated" is quite inappropriate. The United States may fairly be said to have dictated terms to Spain in 1898, but the treaty of peace was the result of more than two months' negotiations. Terms may be said to have been "dictated" by the victorious to the defeated powers after the Thirty Years' War, but the Peace of Westphalia was the result of several years' negotiations. The allies "dictated" terms to France at the close of the Napoleonic wars, as did Germany in 1871, but there were treaties of peace and these treaties were the result of negotiations. It would be idle to cite hundreds of other examples. It is true that the attitude of President Lincoln towards the Confederacy has been hastily commended as suitable to the present occasion; but the difficulty with the analogy is its want of foundation. The Confederate States having undertaken to secede, the only question at issue was that of their renewed submission to the national Constitution and laws, which they had themselves helped to make. These contained all that was necessary. A treaty of peace would have been requisite only in case the effort to restore the national authority had failed. The parties to the present conflict are independent nations. When, how, and on what conditions negotiations shall be undertaken, are questions to be determined on their merits; but, unless the war should end, as perhaps no one contemplates or even desires, in the complete absorption of the one group by the other, it will be closed by a treaty of peace, and the treaty will be preceded by negotiations.

ADDRESS IN HONOR OF DOMICIO DA GAMA¹

IT is not my purpose to pronounce an encomium either upon the guest of the day or upon the country which he represents. Such an effort is altogether superfluous. We meet upon the present occasion not as strangers, but as persons well acquainted, indeed as friends, and friends of old standing, between whom the ornate phrases of studied oratory were long since superseded by the direct and simple language of genuine affection, confidence and esteem. And as it is between ourselves, so it is between our countries.

1. Delivered at a luncheon given by the Pan American Society at the Bankers' Club (New York) to His Excellency Domicio da Gama, Brazilian Ambassador, October 22, 1918. Portuguese version published in *Conciliação Internacional*, Boletim No. 18 (Novembro, 1918).

Who can recall the time when he first lisped the name of that wonderful land of the South, through whose vast domain resistlessly sweeps to the sea the world's greatest river? What child, steeped in the pages of Agassiz and other writers, has not marveled at its treasures, and longed to see with his own eyes the matchless harbor on whose shores stands its seat of government? Who, young or old, has not heard of the extent and variety of its resources, and learned to appreciate the excellence and usefulness of its products? All these things, of intellectual and artistic as well as of material and economic interest, we visualize at the mention of the word Brazil.

But, of still greater interest on the present occasion, is the fact that the relations between our countries have, since the United States almost a century ago recognized the empire of Brazil as an independent nation, been marked by an unbroken friendship. As the United States was the first to recognize Brazil's independence, so Brazil was the first independent state to acclaim the declarations of 1823 in behalf of the freedom of the American continents. Of this traditional friendship no more eloquent expression has ever been made than that which is found in the note of the 4th of June, 1917, in which the guest of the day, in his official capacity, gave notice of his Government's revocation of its decree of neutrality in the war between the United States and the Imperial German Government. While observing that the policy of continental solidarity had also been maintained by the former régime in Brazil, he declared that the Republic, "true to the liberal principles in which the nation was nurtured," had taken "the position to which its antecedents and the conscience of a free people pointed, no matter what the morrow might have in store." And with this memorable avowal, suited to the act which it announced, he pledged the "unalterable friendship of the Brazilian people and Government." We sometimes hear the question debated whether certain nations are "allied" or "associated," but in a union of hearts, such as this, scientific classifications become relatively unimportant.

And what shall I say of the guest of the day? As we met comparatively early in life, I hazard no unwelcome betrayal of age in saying that I have known him a full quarter of a century. Of that time we hold in common many cherished memories; but, although I cannot be insensible to the associations of the past, it is because I have known him so well that I can speak of him with unhesitating conviction and candor.

Speaking in this sense, I cannot do better than employ the lines addressed by Pope to his friend Addison:

"Statesman, yet friend to truth! of soul sincere,
In action faithful, and in honor clear;
Who broke no promise, serv'd no private end,
Who gained no title, and who lost no friend."

Applying these lines to the guest of the day, I am prepared to affirm that the last thing he would desire, or would wish to deserve, would be a reputation for Machiavellian craft and duplicity. On the other hand, it would be unsafe to assume that he could be victimized by such arts; for, while he is sincere, he is also clear-sighted. Nor has he been lacking in honorable ambition. But, if he has gained titles, they have been but the official designations worn by incumbents of the positions which he has won by meritorious public service. As for his friends, do we not see, in the spontaneous tribute which we now witness, an impressive demonstration of their number and their fidelity?

After more than seven years of distinguished service as Ambassador at Washington, his Excellency returns to Brazil to occupy the post of Minister of Foreign Relations. The circumstances under which he does so are peculiarly gratifying. Sixteen years ago his mentor and friend, the late Baron Rio-Branco, of glorious memory, accepted the opportunities and responsibilities of the same high position. In so doing he answered the summons of that eminent, sturdy and wise statesman, Rodriguez Alves, who, returning, after an interval of twelve years, to serve a second term in the Presidency, now calls to his side Domicio da Gama. In the spirit of his illustrious and revered predecessor, our friend has responded to the call; and, in the same spirit, he will labor to promote in the highest sense his country's interests, and to advance the cause of international justice and harmony.

We say to him farewell, not as a final benediction, but only till we meet again. Meanwhile, we shall follow him in his new career with unvarying interest. In all vicissitudes, our warmest wishes will ever attend him. I ask you, in token of that "unalterable friendship" which he so lately pledged, to rise to the sentiment of his health, happiness and prosperity.

THE INTERNATIONAL HIGH COMMISSION¹

GREAT capacity finds its opportunity in great emergencies. Out of the pent-up play of elemental forces there breaks upon the world, from time to time, a bewildering crisis, when only brilliant initiative, combining the power to see clearly, to think quickly, and to act effectively, can meet the demands of the occasion. When this combination presents itself, we recognize in its embodiment the "man of the hour."

To such a man the International High Commission owes its origin. The days following the outbreak of the Great War in 1914 were days of darkness, uncertainty and confusion. The exchanges of the world and commercial transactions everywhere were thrown into sudden disorder. Although the main conflict of arms took place on the continent of Europe, maritime war immediately spread to all the seas, and involved the interests of the American nations, not only in their intercourse with non-American powers, but also in their intercourse one with another.

It was in these circumstances that the Pan American Financial Conference was convoked, early in 1915, under the presidency of Mr. McAdoo. It was a measure of his own creation; but, with a vision extending beyond the immediate present, it was designed to meet not only the emergent but also the future and permanent needs of the American nations. To tide over an emergency is a proof of resourcefulness; to draw from it enduring benefits is the task of constructive statesmanship. International American conferences, political, commercial, economic, literary and scientific, had come and, to a greater or less extent, had gone, leaving after them no established organization for the systematic and continuous carrying out of a definite program. This prime requisite the Pan American Financial Conference, distinctively dealing with the commercial and financial needs of the American continents, first supplied, by the constitution of the International High Commission, a composite body represented in each American Republic by a na-

1. Address on the formal transfer of the Chairmanship of the United States Section of the International High Commission [later Inter-American High Commission]. and of the Presidency of the Central Executive Council, from Mr. McAdoo to Mr. Glass, December 30, 1918. Reprinted from *The Pan American Review*, I, No. 1 (February, 1919), 12-15; Washington, Government Printing Office, 1919, pp. 1-6.

tional section, of not more than nine members, of which the Minister of Finance, or, in the United States, the Secretary of the Treasury, is *ex officio* the chairman. The International High Commission is the aggregate of the members of the national sections. The United States section was placed upon a regular legislative basis by the Act of Congress of February 7, 1916.

For the more effective co-ordination and direction of the work, the International High Commission, at its first general meeting, which was held at Buenos Aires in April 1916, created, as its common organ or agency, a Central Executive Council, consisting of a President, a Vice-President, a Secretary General, and an Assistant Secretary General; and assigned to these positions, respectively, the Chairman, Vice-Chairman, Secretary, and Assistant Secretary of the United States Section.

The program of the International High Commission, as laid down by the Pan American Financial Conference, at Washington, covered a wide, but well considered range, embracing: (1) The establishment of a gold standard of value; (2) bills of exchange, commercial paper, and bills of lading; (3) the uniform (a) classification of merchandise, (b) customs regulations, (c) consular certificates and invoices, (d) port charges; (4) uniform regulations for commercial travelers; (5) the international protection of trademarks, patents, and copyrights; (6) the establishment of a uniform low rate of postage and the improvement of money-order and parcels-post facilities between the American countries; and (7) the extension of the process of arbitration for the adjustment of commercial disputes.

In addition to these subjects, the International High Commission, at its meeting in Buenos Aires, dealt with the extension of banking facilities and of credits, and the stabilization of exchange; the uniformity of laws for the protection of merchant creditors; international agreements for uniform labor legislation; the question of uniformity of national regulations and policies regarding mineral oils; improved transportation facilities between the American Republics; and telegraph facilities and rates, including the use of wireless telegraphy for commercial purposes.

The work prescribed by the International High Commission has been steadily and energetically carried on. Valuable publications, intended to prepare the way for the measures which the Commission has in view, have been prepared, printed and circulated, and appreciable progress has been made in obtaining the adoption of those measures. Actual ameliorations of methods of customs administration have been secured in vari-

ous quarters. Efforts have been made to relieve the burdens and inconveniences caused by the war. But, with a view to practical achievement, the Central Executive Council has singled out, and has pressed with special vigor, certain measures of a comprehensive and systematic nature; and I am glad to say that the results have been most gratifying and encouraging.

Among those measures one of the most important is that bringing into operation the convention adopted by the International American Conference at Buenos Aires, in 1910, for the protection of patents and trademarks. By that convention the American Republics were divided into two groups, the Southern and the Northern. Of the Southern group, Rio de Janeiro was designated as the official center, and of the Northern, Havana; and at each of these capitals there was to be established an international bureau for the registration of trademarks, so as to secure their international protection in the Americas. This treaty, so closely related to the interests of the countries concerned and not least to those of the United States, had lain dormant and unratified. The International High Commission took it up and brought about its ratification by the requisite number of Governments of the Northern group, as a result of which the International Bureau at Havana is now on the point of beginning operations. It is hoped and expected that a similar result will soon be attained in the Southern group.

Another measure specially pressed is the convention to facilitate the operations of commercial travelers. In a number of the American countries local taxes, practically prohibitive in amount, on the operations of such travelers, have for many years existed. A convention was formulated by the Central Executive Council, and, after examination and revision, was submitted by the Department of State to the American Governments, looking to the substitution for all local taxes of a single national fee. This convention, first signed and ratified by the United States and Uruguay, has so far been accepted by eleven other countries.

Another measure preferentially dealt with, because of its significance for the future as well as for the present, is the treaty for the establishment of an international gold clearance fund, the object of this treaty being not only to assure the safety of deposited gold and to avoid the necessity of its shipment when difficulties in transportation exist, but also to facilitate and stabilize exchange through the adoption of an international unit of account. This subject was very carefully studied by the International High Commission, at Buenos Aires; and, as a result of the subsequent co-operation of the Depart-

ment of State and the Central Executive Council, a draft of a treaty, designed to give effect to the plan, has been presented to the American Republics, seven of which have so far accepted it. This treaty by its terms covers only the American nations; but it contains a principle the discussion of which has lately attracted wide attention and which may prove to be of incalculable value to the world in the future.

Among the other activities of the International High Commission and its Central Executive Council, we may particularly mention the preparation and distribution of reports recommending the adoption of certain uniform measures as to bills of exchange, checks, bills of lading, and warehouse receipts, with the result that steps have been taken in some of the American countries towards legislation for that purpose. Moreover, following the example set by the agreement between the Chamber of Commerce of Buenos Aires and that of the United States in 1916, an advance has been made in several other quarters in the direction of the arbitration of commercial disputes. Close attention has also been given to the subject of ocean transportation, and constant efforts have been made to preserve the interests of the American countries in that regard.

It is gratifying to state that the Central Executive Council has had in its work the hearty and active co-operation of various bodies, such as the American Bankers' Association, the Committee on Commercial Law of the Conference of Commissioners on Uniform State Laws, the United States Chamber of Commerce, and the National Foreign Trade Council. Their assistance has been helpful and reassuring.

As a result of the change in the headship of our Treasury Department, we witness today the formal transfer from one hand to another of the official sceptre of power and guidance in the United States Section of the International High Commission and in the Central Executive Council. The occasion is not unlike that in which a good parent, who has nurtured his offspring and conducted it through the first stages of a vigorous and prosperous career, confidently commits it to the care of a well chosen and exceptionally trusted guardian, whose wisdom and capacity have been amply proved. Mr. McAdoo, we are glad to learn, will maintain an official connection with the Commission as a member of the United States Section; but, in relieving himself of the main burden of his charge, he no doubt rejoices in the bright promise which the future, under the able guidance of his successor, holds out. We who have, in our humble way, shared his solicitude and endeavored to co-operate in his aims, also congratulate ourselves upon the prospect.

BOOK REVIEWS

DOCUMENTS RELATING TO LAW AND CUSTOM OF THE SEA. *Edited by* R. G. MARSDEN. Vol. II, 1649-1767. *Publications of the Navy Records Society*, Vol. L. London, Printed for the Navy Records Society, 1917. Pp. xxxiii, 457.

The present volume, like its predecessor, is in large part made up of extracts from original records, particularly those of the prize courts. The editor states that the prize records are in a fair state of preservation, but that, as they were framed in the same bare and technical terms and contained little beyond the bald order of condemnation or of restitution of the ship or goods, they are disappointing as regards the light which they might have been expected to throw upon the growth of prize law. Sometimes, as we had occasion to remark concerning the previous volume, one may wish that the entire text, instead of an extract, of a certain record had been given, since even formal recitals may now and then convey, when read in connection with a judgment, a meaning more readily discoverable by an expert in our subject than by an expert in another. The editor, however, prints the full text of a considerable number of orders in council, of letters of marque and reprisal, of royal instructions to men-of-war and privateers, and of other and cognate documents; and he reproduces from the printed text in the *Collectanea Juridica* (I, 133) the celebrated report of the British law officers, Sir George Lee, Dr. Paul, Sir Dudley Ryder, and the solicitor general, W. Murray, afterwards Lord Mansfield, on the case of the Silesian loan.

We have more than once had occasion to deprecate the widely prevalent but uninformed supposition that the questions of maritime law raised during the present great international conflict are in the mass essentially new. Even the most cursory and inexpert perusal of the present volume should suffice to dissipate such an assumption. In respect of numerous important questions, the contents, fragmentary though they be, carry us back to a time antedating by more than a century the wars growing out of the French Revolution and the Napoleonic Wars.

Worthy of special notice, as indicating that present con-

ceptions are by no means so far advanced over those of earlier times as is generally assumed, is a neutrality proclamation issued by Charles II, February 8, 1668 (p. 70), which forbids any act of hostility in English waters or any hovering there for hostile purposes, and, in case men-of-war or a man-of-war and a merchant ship, of the opposing belligerents happen to be in port at the same time, requires one of the men-of-war to be detained for two tides after the other man-of-war or the merchant ship shall have departed. A foreign privateer having prize property in its possession is forbidden to stay in port more than twenty-four hours, unless constrained by "contrary winds, blocking up by enemies, or other distress," or to sell or leave behind prize goods. Not only are English ships that shall "victual, furnish, or recruit themselves for voyages at sea" to be detained where the "provision or furniture" is suspected "to be designed for any other than trading or fishing voyages," but English subjects are forbidden to enter the martial service of any foreign state, or to accept and execute any commission of war or letter of marque and reprisal. It is interesting to find, under date of July 5, 1712, an inquiry ordered upon a complaint of the Swedish minister that a ship fitting out at Bristol, manned with English sailors, and alleged to be an English ship bound for the Mediterranean, was in truth designed for the Czar of Muscovy.

On the other hand, as indicating that the capacity to "blow hot" and "blow cold," according to interest, is not peculiar to any age, it is curious to contrast a sentence of the Court of Admiralty, in 1653, condemning a Dutch ship for having traded at Barbados contrary to the act of October 3, 1650, which forbade foreign ships to trade with any of the English plantations or islands in America without a license from Parliament or the Council of State, with the instructions given to Captain Ming in 1662 to force a trade upon the Spanish West Indies, the trade with which the King of Spain, their sovereign, had, so the instructions declared, endeavored to engross "contrary to use and custom of all governments and the lawes of nations" (pp. 19, 41). In connection with these two documents, it is instructive to read the commission given in 1729 to a Spanish *guarda costa* (p. 270).

Several documents and extracts from documents are printed which serve to illustrate certain phases of the centuries-old controversy as to the stoppage of provisions destined to the enemy. Under date of May 17, 1665, we have a communication from the Council of State to the judges of the Admiralty urging them to treat as contraband not only naval supplies, such as canvas, masts, pitch, and tar, but "also wine, oil,

brandy, fish, corn, salt, flesh, and all other things that tend as provision unto the support of life," since his Majesty would "in vain attempt the reducing of his enemies, if they shall enjoy the freedom of such unlimited supplies." The judges, it appeared, had forborne to go so far (p. 57). On June 27, 1694, the Lords Commissioners of the Admiralty ordered Admiral Berkeley to send some of his ships, "together with two fire ships," to seize a number of Danish and Swedish ships, proceeding under Swedish convoy and laden with "corn, naval stores, or contraband goods," and to bring them into an English port (p. 160). Fifteen years later (April 28, 1709) an Order in Council was issued for the "stopping" and bringing into an English port of all neutral ships laden with corn and bound to France. The immediate occasion of the order was the receipt of information that there was then "great scarcity of corn" in France; and in these circumstances it was declared to be of the "highest importance . . . to distress the enemy as much as possible by taking the most effectual methods for preventing their receiving such supplies at this juncture" (pp. 210, 211).

The next document bearing upon this question is a brief extract from an opinion of Sir Dudley Ryder and Mr. Murray (later Lord Mansfield) of May 10, 1746 (p. 323). We can only regret that the letter in which the extract was found, if it could not be textually reproduced in a foot-note, was not summarized with legal understanding and precision. Even the descriptive heading apparently betrays a misapprehension of the nature of the legal questions involved. A similar comment must be made upon the singular statement (p. 342), regarding a Dutch *placaat* of 1747 forbidding the export of "warlike and shipping stores," that the "absence" of such an order in later times led to the "armed neutrality." Nor can one help doubting whether the framers of the *placaat* would have accepted the editor's description of the list of articles, whose export was prohibited, as a "list of contraband," in the usual sense of that phrase. Again, in a foot-note to an extract from a document of 1758 (p. 382), relating to the controversy concerning the Rule of the War of 1756, the question of contraband is mentioned in a very brief summary of another document evidently relating to the same controversy. The precise sense in which the author of the second document supposed the contraband question to be involved is not disclosed. The full text of both documents probably would be very instructive.

Sentences of condemnation are produced in 1672 (p. 82), in 1695 (p. 169), in 1709 (p. 209), and in 1767 (pp. 399-400), clearly showing the belligerent character and rights attributed

by the British Admiralty to non-commissioned British armed merchantmen in time of war. In conformity with the established law, their captures were condemned as prize, the condemnation being for the benefit of the crown, which then as an act of grace would remit to the captor a part or the whole of the proceeds. The case in 1767 was that of the French ship *L'Indien* taken by the East India Company's armed ship *Revenge*. After the condemnation, the crown, upon a petition of the company, setting forth that the *Revenge*, while on a voyage from Bombay to Bengal, did "attack, seize, and take" the *Indien*, carrying twenty-four guns and 225 men and laden chiefly with military stores for Mauritius, where "the French ships and forces were then assembled in order to attack the said Company's settlements," ordered "the said prize ship and cargo" to be delivered over to the company as its absolute property.

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A GUIDE TO DIPLOMATIC PRACTICE. *By the* RT. HON. SIR ERNEST SATOW, G.C.M.G., LL.D., D.C.L. *In two volumes.* "Contributions to International Law and Diplomacy," *edited by* L. OPPENHEIM, M.A., LL.D. London and New York, Longmans, Green, and Company, 1917. Pp. ix, 405; xxi, 407.

The author of the present work has had a long and honorable career in the public service. Setting out as a student-interpreter in Japan, in 1861, he eventually came to occupy, after holding various posts in other parts of the world, the position of envoy extraordinary and minister plenipotentiary at Tokio, and later served in a similar capacity at Peking. From 1906, when he was sworn a privy councillor, till 1912 he was one of the British members of the permanent court of arbitration at The Hague. Meanwhile, in 1907, he acted as a British plenipotentiary at the Second Peace Conference at that capital. In treating of diplomatic practice, he therefore enjoys the advantage of writing on a subject on which his experience has made him an authority. The practical diplomatist, however, seldom has occasion to study his profession systematically from the historical and scientific point of view, and the results are of special interest when he undertakes such a task.

The volumes before us contain a copious collection of pertinent matter, interspersed with judicious and helpful com-

ments. In the opening sections, however, the distinction is not made so clear as it perhaps might have been between diplomacy and diplomatics, nor is mention made of Dom Mabillon's epochal treatise on the latter subject, *De Re Diplomatica* (1681), the sumptuous third edition of which, published at Naples in 1789, is now before me. Moreover, general conclusions are sometimes expressed in terms which associate them with a particular form of government—the parliamentary form—more strictly than may have been intended. When the author deprecates (I, 141) direct exchanges between the heads of states, without the knowledge and concurrence of the minister of foreign affairs, as likely to result in misunderstandings, possibly he expresses a view universally valid; but when he says that this “cannot occur . . . in a constitutional state,” and condemns the practice of carrying on secret diplomacy “behind the back of the responsible minister,” he is evidently thinking of parliamentary governments, just as he is when he affirms that the proper person to blame for a weak or unintelligent diplomacy is “the Secretary of State, or Minister for Foreign Affairs.” He adds that “sometimes, in autocratic governments, the responsibility lies on the sovereign.” Whether he would class a government as autocratic merely because it was, like the United States, non-parliamentary in form, does not appear. Probably he would not do so; and when, further on (I, 9), in speaking of the United States, he remarks that “the authority of the President predominates in foreign affairs (as in all other matters),” it is not to be assumed that he was thinking exclusively of the form or contents of the Constitution.

In at least one instance he attributes to the word “sovereign” an importance which it does not possess. After stating that a “sovereign,” when traveling abroad, is exempt from the local jurisdiction, he observes that “nothing seems to have been decided as to the position of the President of a Republic, when in the territories of another State”; but he intimates that “no head of a republic would expose himself to the risk of being refused the immunities accorded to a sovereign,” and that, when a president visits a foreign state, “he either expects to receive, or has been promised beforehand, treatment in all respects the same as that of a sovereign.” This is all very strange, and it would indeed be remarkable to find a case in which the president of a republic had stipulated beforehand for the extraterritoriality which a “sovereign” confessedly enjoys. In reality the question whether the chief executive is a “sovereign” or a president is in this respect quite immaterial. It is not by reason of the fact that he is the one or the

other that he enjoys the immunity; it is solely by reason of the fact that he is the head of a sovereign state.

In the treatment of some subjects, such as that of presents to diplomatic officers (I, 356-363), and the termination of missions (I, 365-407), where even a simple chronological development would have been helpful, there are indications that the author lacked full opportunity for the analysis and scientific arrangement of his materials. The same thing is true of his discussion of mediation and good offices (II, 289 *et seq.*). The author, after expressing the opinion that the two processes are "essentially distinct in character," and referring to The Hague convention for the pacific settlement of international disputes, which, as he correctly observes, makes no distinction between them, quotes, on the one hand, Pearce Higgins, who regards the difference as "more theoretical than practical," and, on the other hand, Oppenheim, who undertakes to make the distinction that a power, when using "good offices," "does not itself take part in the negotiations," whereas a mediator "is the middleman who does take part in the negotiations." In reality, it would hardly be useful to espouse either view, nor would the authorities cited wholly sustain either of them, in the terms in which they are here respectively set forth. The highest authorities often apply first the one title and then the other indiscriminately to the same proceeding, and it will hardly do to say that they are wrong, since the best usage has not strictly reserved either title for a single definite and distinctive form of procedure. The most one can say is that it would be desirable to make certain precise distinctions, and then to adhere to them. "Mediation" has no doubt been used to denote certain formal procedures which "good offices" would not properly describe: e.g., the procedure formerly common, of conducting negotiations, as at Münster and elsewhere, indirectly through "mediators," instead of directly between the plenipotentiaries; also, the formal submission of a point in dispute to a third party, who, because he is invested with power only to make a recommendation, and not to render a final decision, acts, not as an arbitrator, but as a "mediator," one of the most striking modern examples of such submission, which the author does not mention, being that of the dispute between Germany and Spain as to the Caroline Islands to His Holiness the pope. On the other hand, the inadmissibility of the test that the power using good offices "does not itself take part in the negotiations" is at once demonstrated by the universal and approved application of the term to the care of the interests of the citizens of a country which has no diplomatic or consular representative on the spot. In this common instance, the function

of the power using its "good offices" is precisely that of conducting the negotiations. Moreover, mediation is confused with a radically different process, when (II, 358) "arbitration" is said to be "essentially" the conferring upon a "mediator," instead of "a commission to negotiate terms of settlement," the "more extended power of pronouncing a judgment." The fact that an arbitration might follow or even result from a mediation would not make the one process a part of or an extension of the other; and in reality they are rarely connected, although in the Dogger Bank case they were combined without being confused. Nor does the history of arbitration bear out the statement that it will "on the whole" be employed only "where the subject-matter . . . is of comparative unimportance." The presence or absence of a desire for an amicable settlement is, however, as the author observes, a factor of great moment.

In several instances reliance upon secondary sources has resulted in the perpetuation of erroneous impressions. The author (I, 272) correctly invokes the authority of Calvo for the statement that the United States once asked for the recall of the Dutch minister because he refused to appear and submit himself to cross-examination as a witness in a criminal case, even though in so refusing he followed the instructions of his government. Whence Calvo derived this singular impression does not appear, since his citations refute it. Likewise, the statement, for which American authority is adduced (I, 196), that the United States "adheres to its ancient rule" in declining to inquire in advance as to the personal acceptability of diplomatic representatives below the grade of ambassador, is not in accord with existing practice, it having for some years past been the rule also to make such inquiries in regard to appointees below that grade. That Anson Burlingame did not come to the United States as a "special ambassador" (I, 198) is shown by his description, in the treaty which he signed at Washington, as envoy extraordinary and minister plenipotentiary. The supposition (I, 334) that the note of Mr. Fish to Baron Gerolt, to which Bismarck replied on January 15, 1871, regarding the delivery of despatch bags during the siege of Paris, "has not been printed," seems to have occasioned a surmise that it was withheld because its contents were abandoned; the note was, however, dated, not "a month before," but on November 21, 1870, and was printed in *Foreign Relations*, 1871 (p. 401). The account of Lord Sackville's case (I, 386) is quite accurate; but in estimating the comment, quoted from an unfriendly American source (I, 388), upon Mr. Bayard's "unseemly haste," we may, while

admitting that Sackville's prompt dismissal presupposed a weakness in the electorate fully as deplorable as his lordship's inept letter, bear in mind that responsibility for the decision may have rested quite as much with the President as with the Secretary of State; that the President could hardly have been unacquainted with the prevalent belief that Blaine's defeat four years before was due to his failure immediately to rebuke Burchard's unfortunate alliteration; and that, if agitated voters could be convinced and held only by the minister's dismissal, it had to precede the election. As the same President on another occasion remarked, it was "a condition not a theory" that confronted him. That the condition might have been adequately met by a public appeal to common sense is a supposition which experts will not unanimously indulge.

It is our impression that the French noun *national*, now so generally used in diplomatic correspondence (I, 167), is potentially more comprehensive than the English words "subject or citizen"; and the view based upon the authority of some writers, that the right of embassy "is a matter of *comity*, and not of *strict right*" (I, 180), may be open to interpretation. From the statement (I, 106) that, "before the signature of a treaty," it is "the rule that the full powers of the plenipotentiaries must be exhibited for the purpose of verification," the inference doubtless was not intended to be drawn that the examination is usually deferred till the treaty is ready to be signed; since on important occasions, and particularly in the case of special plenipotentiaries, the preliminary examination of the full powers is only a prudent precaution, as is shown by notable examples in recent as well as in earlier years. Those who may be disposed superficially to jeer or to "chortle" at Jefferson's rule of *pêle-mêle* as an attempt to carry democracy to excess may do well to note (I, 19, 237; II, 35, 43, 70, 71, 79) the frequency with which that rule was adopted by monarchical governments, as little chargeable with popular proclivities as was that of Louis XV. In narrating former disputes as to precedence (I, 20-21) the fact might have been noted that the action of Pombal in establishing a new rule at Lisbon was recited in France's declaration of war against Portugal in 1762. It hardly speaks well for the progressive purification of diplomacy that the author reaches the conclusion that "the law of nations is not concerned with bribery"; that it is "a question of morality alone"; and that, "since every government provides itself with a secret service fund, it is evident that the practice of purchasing secret information is more or less universal." Whether those who inveigh against

"secret diplomacy" will feel reassured by this intimation, will depend upon their point of view.

The reviewer, vividly recalling the circumstance that, at the first civil service examination for admission to the Department of State, at Washington, the candidates, of whom he happened to be one, were asked to state the number of square miles in France, regrets that the commissioners of that day could not have had the benefit of the author's opinion (I, 184) that, in the education of a diplomatist, "geography, beyond elementary notions, is not of great value," and that he "will acquire what geographical knowledge he needs of the country to which he is appointed while residing at his post." Although opinions may differ as to what the "elementary notions" of geography may embrace, the reviewer is confident that the phrase was not intended to include the superficial area of the various countries of the world; and in this belief he is glad to acknowledge, with fraternal warmth and gratitude, the retrospective consolation which he derives from the author's view.

Reprinted from *The American Historical Review*, XXIII (1918), 634-638.

THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS. By EDWARD S. CORWIN, Ph.D., *Professor of Politics, Princeton University*. Princeton, University Press; London, Humphrey Milford, Oxford University Press, 1917. Pp. vi, 216. \$1.50.

Of the present volume about five-sevenths are composed of extracts, chiefly from public documents, while the remaining two-sevenths contain narrations by the author and his own reflections, the narrative element largely predominating. His main objects, as stated in his preface, were (1) to "cull from a rather voluminous 'literature' the best material pertinent to the subject," and (2) "to state succinctly the results that seem to spring from the discussions canvassed and from actual practice." Perhaps it was in the nature of things that the first object could be more readily attained than the second, since not only is the "literature" of the subject largely controversial, but practice has likewise reflected differences of opinion and of disposition. In such circumstances the statement of results, if it is to assume a definite form, requires much weighing of evidence and much mature reflection.

We are told that "actual necessities" have "more and more centred the initiative in directing our foreign policy in the

hands of the President"; but we are assured that "this is far from saying that the President is even yet an autocrat in this field," and that, so long as he must discharge his functions "ordinarily" through the agencies provided by Congress, may expend public money only for the purposes which Congress may prescribe, and is subject to the constitutional obligation to take care that the laws be faithfully executed, it is "difficult to see how he can become an autocrat, save at extraordinary moments and when backed by the overwhelming approval of American public opinion." On the other hand, from the fact that the President is the "organ" of diplomatic intercourse the inference is drawn (1) that the power is "presumptively his alone," and (2) that his "discretion" in the exercise of it "is not legally subject to any other organ of government."

With this exposition of his powers and opportunities a chief executive, even though inclined to have his own way, might be fairly content. But presidential prerogative and presidential action have not been so uniformly vindicated as the reader of the present volume (pp. 40-45) might suppose. In the case of the Greater Republic of Central America, the executive action was persistently frustrated by the refusal of Congress to change the appropriations for diplomatic representation in that quarter. Besides, in contrast with what happened in the case of the Panama Congress, the fact may be noticed that the Congressional resolution authorizing the calling of the first International American Conference prescribed the subjects which it was to consider. Moreover the report of the Senate committee by no means "vindicated" (p. 64) President Cleveland's action in undertaking to give Commissioner Blount "paramount authority" over the American minister at Honolulu: the report, as the passage quoted from it shows, tacitly confessed the fault, evasively representing that Blount was despatched by the President to Hawaii merely as his "personal representative" to seek "further information." On the other hand, while it is uncertainly stated (p. 82) that "recognition" belongs to the President alone or to the President in conjunction with the Senate, the attempt to force on President McKinley the recognition of the "Republic of Cuba," far from having "finally prevailed" (p. 80), finally failed. Huerta did not claim recognition as "the *de facto* government of Mexico" (p. 83), but as constitutional president. To speak of arguments relating to extradition as being "much in point," where the question is one of compacts "not demanding enforcement by the courts" (p. 125), tends to mislead. Still more so does the statement that the "power of Congress to declare war" appears "in actual exercise" to have been "the power to recog-

nize an existing state of war," and that "the President alone may also exercise this power, at least in the case of invasion or of insurrection" (p. 141). A diminution of the power of Congress, or an enlargement of that of the President, is not to be inferred from verbal jockeying for diplomatic advantage in the international game. The supposition, for instance, conveyed by some of the documents of 1898, that Spain, in accepting as an "evident declaration of war" the joint resolution under which the President was despatching the army and navy to expel her from Cuba, began a war the existence of which it was then left to the Congress of the United States only to "recognize," possibly should amuse, but certainly should not confuse, the student of law or of diplomacy.

How far an author may be expected to correct erroneous statements of fact in passages which he quotes from judicial opinion, may be a delicate question. The version of the *Koszta* case, quoted (p. 142) from the opinion of the Supreme Court in the case of *Neagle*, is inaccurate and misleading. Nor does the author's statement (p. 143) of the ground of the demand in the *Greytown* case strictly accord with the record. The statement (p. 156) that the President's power to use force "defensively" is "practically" limited by "the powers of Congress and public opinion," though put forward as a conclusion, does not advance us far. The subject is, however, scarcely capable of precise definition.

In connection with the claim expounded by Colonel Roosevelt in his *Autobiography*, that it was not only the right but the duty of the President "to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws," the author quotes at great length a discussion in the Senate between Messrs. Bacon and Spooner of the subject of treaty-making; but the ground covered by this debate is by no means so extensive as that covered by the claim. A conception of presidential power so fundamental would seem to justify direct analysis and comment.

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THE LAW OF INTERSTATE RENDITION, ERRONEOUSLY REFERRED TO AS INTERSTATE EXTRADITION. By JAMES A. SCOTT. Chicago, Sherman Hight, 1917. Pp. xiv, 534.

The author, reiterating the thought conveyed in his title, opens his text with the phrase, "Interstate rendition, fre-

quently but inaccurately referred to as 'interstate extradition.' But, as if almost shrinking from the possible consequences of this audacious innovation, he proceeds to declare that, while he "fully realizes" that "such a radical change as the substitution of the word 'rendition' for the commonly used word 'extradition,' may not be received with general favor, yet, accuracy and precision in the use of words demand the adoption of 'rendition.'" Several pages farther on he graciously observes that the present reviewer, "in his book on 'International Extradition and Interstate Rendition,' held to the same view."

In a play once much in vogue with the votaries of the comic stage, bearing, as the reviewer recalls it, the euphonious title "Our Boarding House," the leading roles were borne by two rival singers, who, with a view to exhibit their respective merits, alternately assailed with ever rising inflection the auditory nerves of their unfortunate fellow-lodgers. The reviewer trusts that he may not be suspected of harboring vocal ambitions, if he admits that almost a generation ago, in 1891, he did publish a treatise in two volumes, entitled, as he dimly recalls it, not "International Extradition and Interstate Rendition," but *Extradition and Interstate Rendition*, the second volume of which was devoted to the latter subject. In this work, which has happily proved to be a fecund source of even unconscious inspiration and succor to subsequent writers, he ventured, not diffidently, but with full, aggressive confidence to expound, as he affirmed, "the fundamental difference between extradition and interstate rendition," and to introduce into the law the distinctive terminology again unfurled to the world by the present author. Declaring in his preface that, in his judgment, the "rendition" of fugitives from justice as between the components of the Union was "not properly described as extradition" he explained that, since "the accurate employment of terms" was "of the utmost importance," and the use of the word "extradition" invited the application of the principles of international law to the interstate proceeding, the second part of his work had been called "Interstate Rendition." This thought he also reiterated in the opening sentence of his second volume, explicitly asserting that, while the use of the term "extradition" in the interstate proceeding was "firmly established," it was "nevertheless inaccurate and misleading"; and from this point on, throughout the volume, he endeavored, by running title as well as argumentative demonstration, to impress the distinction and its connotation upon the profession. Not long afterwards, in *Lascelles v. Georgia*, 148 U. S., 537, the Supreme Court of the United States, which

had not passed upon the point before, sanctioned the distinction and adopted the reviewer's emblem of it, in an excellent opinion prepared by Mr. Justice Jackson, who had just then been called to that exalted stage. It is true that the learned justice, with that tendency to omission said to characterize "first appearances," neglected Paine's caution against undue preoccupation with plumage, and, while espousing the innovation, forgot to mention the author of it; yet the brief for the State of Georgia, with which the opinion exhibits an intimate acquaintance, abundantly quoted, with punctilious citation, the reviewer's then recent treatise; and the reviewer recalls with pleasure the circumstance that counsel for that State, before the case was decided, courteously sent him a copy of their brief, with an appreciative letter of acknowledgment. The learned justice moreover referred to "the clear opinion pronounced by Lumpkin, Justice," in the court below, which repeatedly cited the same treatise and adopted its terminology, as well as to the then recent case of *Comm. v. Wright* (Mass.), 33 N. E. 82, in which Chief Justice Field, adverting to the fact that Spear and the reviewer reached "opposite conclusions," sanctioned the latter's position and his use of the word "rendition."

The present work should prove to be useful both to lawyers and to administrative officials. It states and analyzes cases very fully, and embraces the latest decisions. No doubt the text would often have been susceptible of condensation, but, as the volume is not cumbersome, this is a defect less serious than would have been that of oversight or material omissions. Nearly a third of the work is devoted to a reprint of the statutes of the several states, to which are added those of Alaska and Porto Rico, on the subject under consideration. Such a collection is convenient for the practitioner. It is followed by a table of cases.

Reprinted from the *Columbia Law Review*, XVIII (1918), 288-289.

INTERNATIONAL CONVENTIONS AND THIRD STATES.

By RONALD F. ROXBURGH. London, Longmans, Green & Company, 1917. Pp. xvi, 119.

The present work is the second to appear in the series of "Contributions to International Law and Diplomacy," edited by Professor Oppenheim, who, in an introduction, states that the author has "brought together a considerable amount of material" and has "come to very valuable conclusions which

require thorough examination and consideration." The author enables us to get a general view of his conclusions by closing his volume with a recapitulation of them. To a great extent they furnish no occasion for discussion. On the other hand, some of them present ample opportunity for speculations, more or less vague, and tending to create unnecessary if not essentially futile distinctions. Oppenheim is cited (p. 45) as authority for the proposition that, in the cases of accession or adhesion, "the rights and liabilities incurred (*sic*) by the third state are incurred, not under the old treaty, but under an additional treaty identical in terms with the old." As Oppenheim's words are that "accession always constitutes a treaty of itself," it is not clear that he intended to deny that the acceding or adhering state acquires rights and incurs liabilities under the "terms" of the "old treaty." Nor is it clear that we must accept as valid the author's proposition (pp. 111-112), that, assuming there is such a thing as inferentially becoming a party to a treaty by conduct, the presence of a clause of "accession" or of "adhesion" "prevents" the creation of such "additional contract" by "conduct amounting to acceptance." Is not such a clause to be regarded as an invitation to accept, rather than as the prescription of an exclusive mode of acceptance? On the other hand, the loose speculations of various recent writers, as to the inferential acceptance of certain treaties, such as the Suez Canal convention and various neutralization clauses, by non-signatory and non-adhering powers, may serve to warn us of the importance of keeping such questions within the bounds of definite legal conceptions.

The author speaks (p. 112) of a treaty becoming the "basis" of a rule of "customary law," where states "concerned in its stipulations" habitually "conform" to them "under the conviction that they are legally bound to do so"; but adds that in this case the rights and obligations which were "originally conferred and imposed by treaty, have come to be conferred and imposed by a rule of law." In other words, the theory, translated into simple language, is, as we understand it, that the rule becomes obligatory upon other states, not by force of the treaty, to which they are not parties, but by their conduct in observing it "under the conviction that they are legally bound to do so." But whence are we to infer such a "conviction"? Surely not from the treaty, which confessedly is not legally obligatory upon them. The author himself appears to be quite uncertain, for under the title "Can a Conviction of Legal Necessity ever be Presumed?" he states (p. 81) that it is a question "whether, in the absence of direct evidence, it is ever right to 'presume' that a nation acted in a certain way from a

sense of legal necessity"; and, while remarking that "perhaps such a presumption ought in certain circumstances to be made," says that "no rule of international law exists on this point."

In this instance, as well as in numerous other instances, the author indeed appears to have been led into metaphysical and somewhat artificial methods of conjecture through tentatively assuming or suggesting that certain legal rules or speculations may by analogy be applied to situations to which no analogy is shown. This is the case with his citations (pp. 6-18) of general and often indefinite declarations in various countries of the local law relating to beneficiaries, and (pp. 72-95) of speculations concerning the influence of "custom" on the development of municipal law. It would, on the other hand, have been pertinent to trace the actual genesis of certain international rules, such as that of "free ships, free goods," the acceptance of which was advanced by their incorporation in treaties, without anyone's supposing that they were in any sense "imposed" on non-contractants, or that the latter adopted them under a "conviction" of legal necessity. In this relation one may profitably recur to the simple and lucid exposition of the growth of international law given in the *Paquete Habana* (1900), 175 U. S., 700.

The author speaks (p. 54) of Austria's "breach" of the Treaty of Berlin in proclaiming in 1908 the annexation of Bosnia and Herzegovina, which were handed over by that treaty to Austria-Hungary to be "occupied and administered," without limitation as to time. On the other hand, he takes the view (pp. 109-110) that the territories occupied by European powers in China, under leases for terms of years and for the most part with an express reservation of Chinese "sovereignty," are to be considered as part of the dominions of the lessees, and that the change in the relations of third powers to such territories is to be attributed, not to "the legal operation of a lease as such," but to "a change in sovereignty, either partial or complete." Furthermore, immediately afterwards (p. 110), in referring again to the situation of Bosnia and Herzegovina from 1878 to 1908, he observes that in such cases the changes in the relations of third states "seem to be properly attributable to what is, for most practical purposes, a transference of sovereignty." Would one be unjustified in inferring from this that Austria's act in 1908 was, in the author's opinion, a violation of form rather than of substance, censurable perhaps chiefly because it was superfluous, and that the use in China of the form of a lease was, so far at least as concerns the European powers, an intentional dis-

guise? It may, however, be pointed out that the lease of Kiaochau to Germany expressly speaks of the latter's "rights of sovereignty" over "the whole of the water area of the bay," but not over the surrounding zone of 50 kilometres, wherein privileges were granted subject to a reservation of China's "rights of sovereignty."

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A WORLD COURT, IN THE LIGHT OF THE UNITED STATES SUPREME COURT. *By* THOMAS WILLING BALCH, *of the Philadelphia Bar*. Philadelphia, Allen, Lane & Scott, 1918. 163 pp.

Men have, as the author truly remarks, long sought to ward off the ravages and burdens that result from war. The Romans, the feudal barons of Europe, the lake-dwellers of Switzerland, the Chinese, built fortifications, castles, and walls, while the Venetians, the Dutch, and the English built fleets; and now great swarms of aircraft are created for purposes of attack and defense. Each nation looks upon its own preparations as a means of securing it against attack. Meanwhile, pacific methods of settling disputes—good offices, mediation and arbitration—were tried, but none of them proved to be completely efficacious. In 1899, as a result of the first Hague Conference, there was created the Permanent Court at The Hague, composed of persons named by the various signatory powers, from whom a tribunal might be chosen *ad hoc*. Subsequently, however, there sprang up an agitation for a court with a permanent personnel, which was to have more nearly the appearance and the characteristics of a fixed and personally definite supreme international judicial tribunal. The frequent invocation in the United States of our own Supreme Court as an example of what was desired, for the purpose of obtaining strictly "judicial" judgments, free from any element of bias or compromise, has led to the preparation of the present monograph, in which the record of the Supreme Court, in the decision of cases involving political or diplomatic elements, is surveyed.

The results, as Mr. Balch points out, are by no means uniform or consistent, failure as well as success having attended the court's efforts to deal with such elements. In the celebrated Dred Scott case, the pronouncement produced the very opposite effects to those hoped for and intended. In reality, the

lament so often heard that the judges, in deciding questions of a certain type, and particularly "constitutional" questions, have exhibited a "party" bias, proceeds largely from superficial thinking. Because such questions were submitted to a "court," their essentially political character has been overlooked, and it has seemed to be supposed that they could be decided "judicially" without reference to political theory. No doubt, under a system controlled by the principle of *stare decisis*, a rule may be established by a series of judicial decisions which judges may be expected to follow until it is changed by legislation or by constitutional amendment; but, even with this assurance, the possibilities of a tranquil stability are essentially limited by the constant development of novel situations and the opportunities which they afford for new interpretations, to say nothing of the recurring changes in personnel to which every human tribunal is subject.

On the other hand, in much of the recent agitation for a "world court" it has been distinctly proposed to limit its jurisdiction to questions of a "judicial order," sometimes defined, positively or negatively, in a sense so narrow as to exclude practically all disputes of a serious character.

In discussing the various aspects of the problem, Mr. Balch has endeavored to point out the danger of placing undue reliance upon any single method of settling disputes, while neglecting the causes by which they are produced. Unfortunately, there is a general tendency, familiar to students of law and of history, to find a sense of security in devices because they are supposed to be new. To this cause is chiefly to be ascribed the hasty and unadvised legislation which so often defeats the end which it was intended to accomplish, while creating difficulties that did not previously exist. For this reason a careful analysis, such as Mr. Balch has given, of fundamental conditions, in the light of experience, is always to be commended as a work of real value.

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INSTITUT AMÉRICAIN DE DROIT INTERNATIONAL.
ACTE FINAL DE LA SESSION DE LA HAVANE, 22-27
JANVIER 1917. RESOLUTIONS ET PROJETS. New
York, Oxford University Press, 1917. Pp. xiii, 129.

This volume contains the record of the proceedings at the second meeting of the American Institute of International Law, which was organized some time ago under the auspices of the

Carnegie Endowment for International Peace, and of which Mr. Root is honorary president; Dr. James Brown Scott, president; and Dr. Alejandro Alvarez, general secretary. The proceedings indicate the prevalence of a striking harmony of sentiment. The "Acte Final" was adopted by a unanimous vote, as had previously been ten recommendations on international organization, moved by the president of the society. These recommendations embraced the calling of a third Hague Conference, as well as the establishment of regular periodical meetings of the Conference, the regulation of its procedure, and the systematic carrying on of its work; an international agreement on certain fundamental principles of international law, such as those adopted by the Institute itself on January 6, 1916; the creation of a council of conciliation to deal with questions of a non-justiciable character, and the employment of good offices, mediation, or amicable concession for their solution; the regulation of the process of arbitration; the negotiation of a convention creating a judicial union, after the type of the universal postal union of 1908, in order to secure the submission of questions of a judicial order to a permanent court; the creation of a pronounced public opinion in favor of these proposals and in general of the pacific solution of international disputes.

Certain *vœux* were also unanimously adopted, the first of which expressed the wish that the Central American Court of Justice, established under the international convention signed at Washington, December 20, 1907, might be maintained as a guarantee of peace between the republics of Central America.

Accompanying the "Acte Final" there are several appendices, containing commentaries by Dr. Scott on the recommendations adopted on the subject of international organization; and projects and explanations (*Exposé des Motifs*) by Dr. Alvarez. In these Dr. Alvarez treats of the reconstruction of international law both in its universal aspects and in its application to special situations or questions such as exist on the American continents.

In an *exposé* relating to the creation of a continental union or council of conciliation, Dr. Alvarez makes a searching examination of the "League to Enforce Peace," formed in the United States under the presidency of Mr. Taft. His conclusions are altogether unfavorable. Dr. Alvarez maintains that the actual results would be contrary to the end sought. If the aggressor was a secondary power, it might indeed be readily suppressed; but, if it was a great power, it would not, he believes, be restrained. Feeble states, and states having no direct interest in the dispute, would hold aloof, and the league would prove to be a mere engagement on paper.

Dr. Alvarez also considers the platform or plan of the league to be defective in that (1), while it assumes the principle of universality, it in terms embraces only signatory powers, and is thus self-contradictory and inconsistent; (2) it provides no sanction in case the parties refuse to accept the decision of the arbitral tribunal or the advice of the council of conciliation, nor does it cover the case of war between a non-adhering power and a member state; (3) it does not prescribe or define the character or the composition of the proposed tribunal and council. He believes that these are capital defects, and that the entire plan tends to ensure control by Great Powers, after the manner of the Holy Alliance. So far as concerns the New World, Dr. Alvarez declares that the American Republics could hardly submit to such a coercive regimen. He holds that the maintenance of peace cannot be assured by such means. The problem is, in his opinion, far more complex than the advocates of the measure under consideration have supposed. He believes that the evil must be treated at its roots by organizing for peace, in the sense of avoiding or minimizing the causes of conflict and developing a spirit of solidarity and co-operation. The causes of conflict among states are, he truly observes, of various kinds—political, economic, social, psychological, moral. A careful examination of them shows that they for the most part proceed from the all-pervading spirit of individualism, so constantly manifested in national and international life, which impels each country to seek a development which it does not think it can obtain by dependence on other countries. From this source there has arisen the narrow and chauvinistic nationalism which has, in spite of the progress of civilization, engendered economic rivalries, imperialistic policies, the hates of races, the desire for revenge, and the idea or postulate which has up to the present time dominated international relations, namely, that so-called questions of "national honor" or "national dignity" must not be submitted to arbitration, but must be solved by arms.

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A REPUBLIC OF NATIONS. A STUDY OF THE ORGANIZATION OF A FEDERAL LEAGUE OF NATIONS. *By* RALEIGH C. MINOR. New York, Oxford University Press, 1918. Pp. xxxix, 316.

The present volume justifies the expectations which one would naturally indulge regarding a new work from the pen

of the author Minor on the *Conflict of Laws*. It is thoughtful, analytical, logical. It exhibits a clear conception of what is essential to the effective accomplishment of an object which many persons are at the moment desirous to attain, even though it may betray hopes which the event will disappoint.

Grouping international controversies into two great classes, consisting (1) of disputes behind which, on one side or the other, lie ulterior evil or illegitimate designs of aggression or attack upon the rights of other nations, and (2) of disputes arising spontaneously and without ulterior designs, Mr. Minor clearly perceives the fundamental inadequacy of so many of the "leagues," proposed in recent as well as in former days, to meet the exigencies of the case. So far as concerns, specifically, a league "for the enforcement of compulsory arbitration or conciliation, with a covenant by all to unite in war or other forcible measures against any nation declining to engage in either form of settlement," he submits that there are, quite apart from the reluctance of nations to consent to the effective prevention of war, "practical obstacles" to the successful operation of a plan of that nature arising out of the difficulty of securing concert of action among the members of the association. How, he asks, would troops, ships, and expense be apportioned? Who would command? Would all the parties unite in opinion as to who began or was responsible for hostilities? Would not the judgment of the members, and consequently their attitude, be affected by pre-existing friendliness or unfriendliness to one or the other of the disputants? For these and other reasons he makes the plea that the league "take the form of the establishment of a federal international government, by which the nations will either agree, under proper safeguards, to surrender to the government of all jointly their power to injure or work injustice upon their sister States or agree that they shall not be exercised at all."

On this line the author proceeds to work out a plan in detail, and in an appendix, at the end of the volume, presents, in parallel columns, for purposes of comparison, the Constitution of the United States and his "Tentative Constitution of the United Nations."

While Mr. Minor is by no means disposed to rely unduly upon judicial tribunals as a means of preventing armed conflicts, he does not wholly escape the tendency, which seems to be almost universal, to assume that the Supreme Court of the United States has played a more important part than it really has done in the settlement of political controversies. But for the circumstance that the Dred Scott case is habitually over-

looked, we should deem it unnecessary to mention the fact that the miscalculated pronouncement of the Supreme Court in that case, closing the door to compromise, rendered the Civil War morally inevitable. On the other hand, distinctively "inter-state controversies," to which the author refers, have not been so very numerous; nor has the court always settled even such as have been brought before it. *Kentucky v. Denison* involved an interstate controversy, but the result was a fiasco, the governor of Ohio being left to continue what the court declared to be a clear defiance of the national Constitution and laws. It is some years since West Virginia was adjudged to be liable for a part of the debt of Virginia, but West Virginia has so far omitted to discharge that liability. No doubt these incidents go to sustain rather than to weaken Mr. Minor's main thesis, that there is little analogy between the Supreme Court of the United States and the proposed "world court" of which so much has been said.

There is yet another misconception for which, although the author lends it his countenance, he cannot fairly be held responsible, and which we might for that reason be inclined now to pass over, were it not so constantly reiterated. We refer to the supposition that international arbitration has "failed" because it has represented, in theory and in practice, the idea of "compromise" rather than that of "judicial" decision. The present prevalence of this supposition is no doubt chiefly to be ascribed to the activities of certain societies, exhibiting a certain unity of direction and control, which have industriously disseminated the impression, not indeed with malice, but without examination of the facts. The impression involves two assumptions, (1) that "compromise" has not formed an important element in "judicial" judgments, and (2) that it has, on the contrary, distinctively characterized the proceedings of international tribunals of arbitration. Both these assumptions are hasty, superficial, and inaccurate. So far as concerns international arbitrations, it has fallen to the lot of the reviewer to become familiar with the proceedings of substantially all of them, ancient and modern, so far as they can now be known; and he does not hesitate to affirm, upon the strength of this somewhat exact knowledge of the subject, that the assertions so constantly made during the past few years, as to the "non-judicial" or "unjudicial" character of arbitral proceedings, are due to unverified preconceptions and are essentially misleading.

THE PEOPLE'S PART IN PEACE. By ORDWAY TEAD. New York, Henry Holt & Company, 1918. Pp. ix, 156.

It was said of a well-known writer on international law, in the middle of the last century, that he presented all views and all contentions with "laborious impartiality." This cannot be said of the vast number of volumes now appearing on peace and the organization of the world so as to secure it. Many authors have specifics; others have none, but profess to deal with the entire problem; while yet others discuss particular phases of it. Mr. Tead assures us that "the plain people of the world want peace," but "not peace at any price." This condition is not wholly new. He does not, however, undertake to estimate all the elements of "price," but endeavors to answer the question how "practical effect" can be given to the peace terms and the conditions contained in the Inter-Allied Labor War Aims which were published in a supplement to *The New Republic* of March 23, 1918, and which he declares to be "in complete harmony with President Wilson's fourteen-point speech."

It may be unnecessary to raise a question as to what effect recent elections, particularly in Great Britain, may have had on the position, international as well as national, of the declaration of the Inter-Allied Labor War Aims in the negotiations soon to take place in France. Mr. Tead's discussion is not wholly concerned with that declaration; and, although he professes to treat "only" of the economic phases of international reorganization, he discusses at some length the question of a league of nations, the economic guarantees of peace, international labor legislation, the basis of representation in "international government," national economy, and "the spiritual guarantees of peace." He recognizes the truth that, while the struggle for existence is an all-pervasive influence, ideas not essentially economic enter into the problem of peace and war. Among these he specifies the exaltation of force, in the conception that might makes right; the doctrine that the state is supreme and is a thing in itself; that the state exists as an agent for the creation of national profits; that trade exists primarily for the private traders, and that certain races are inferior and unable to govern themselves, either immediately or ultimately. He believes that, while these ideas have "wide currency" in Germany, they are maintained elsewhere by a sufficient minority to make it worth while to understand the dangers which their acceptance entails. He believes it to be necessary to distinguish more carefully than is usual the difference between incapacity for self-government and an im-

maturity in national development due to historic forces, especially as a lack of national cohesion may be found to prevail in parts of the world that properly resent the imputation of inferiority. He thinks that "the new world, the world of the next generation, is unmistakably destined to swing about a new center—the human individual," and that to spiritualize the purposes of life is the "paramount task of reconstruction." For old methods he would substitute "social control" for "social ends"; and he declares that "social control depends upon the enthroning of a new principle in individuals and in nations—the principle of the value of people as supreme over profits and property, over secret treaties and States."

We hope that the author's generous views may find wide acceptance. So far as concerns "secret treaties," it may be remarked that, with the exception now and then of a stealthy agreement for the division of territory, the treaties by which "profits and property" have been exalted have usually been of a flagrantly open character. Treaties relating to trade and tariffs are the ones whose approval by legislative chambers has in modern times most generally been exacted. We would not discourage anyone's hopes or aspirations; but it is idle to shrink from the conclusion that the regeneration of the world will continue to depend less upon the enunciation of benevolent principles than upon the precise, practical application of them.

Reprinted from the *Political Science Quarterly*, XXXIII, No. 4 (1918), 600–602.

GUIDE TO THE LAW AND LEGAL LITERATURE OF ARGENTINA, BRAZIL AND CHILE. *By* EDWIN M. BORCHARD. Published by the Library of Congress, Washington, 1917. 523 pp. \$1.

This is the fourth in the series of guides to foreign law begun by the author when he held the post of law librarian in the Library of Congress, whose head, with characteristic intelligence, perceived the value of such work when well done, and gave it support and encouragement. In the present volume, as in those that have preceded it, there is the threefold object (1) to furnish lawyers and students with information as to the institutions and legal literature of the countries concerned, (2) to acquaint legislators and men of affairs with developments in foreign legislation, particularly on economic and social questions, and (3) to aid students of jurisprudence and of history with a discriminating indication of the sources

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from which a knowledge of the contributions of other countries to the theory and philosophy of law may be obtained.

In the performance of his present task, the author had the advantage of making a journey through the countries of Central and South America, including the three whose law and legal literature the work now before us surveys. Not only was he thus enabled to supplement his studies in the foreign law collections of the Library of Congress by studies in each of the countries concerned, but he had the highly valuable opportunity of direct conference with their jurists and scholars. As a result he is often able to impart to what might otherwise have been a dry bibliographical description or reference an illuminating quality which tends to instruct as well as to interest the reader. In this relation he makes special acknowledgment of his obligations to Dr. José León Suarez and other members of the Faculty of Law of Buenos Ayres, to Dr. Rodrigo Octavio and Senator Ruy Barbosa of Rio de Janeiro, and to Señor Carlos Silva Cruz and Dr. Julio Philippi of Santiago de Chile—names very familiar to those who are acquainted with recent developments in legislation and in legal science in South America.

The reader cannot fail to be impressed with the extent and variety of the legal literature here passed in review, embracing, as it does, commentaries on constitutional law, on the organization and procedure of the courts, on the codes of civil, commercial, and penal law, on administrative, military and ecclesiastical law, and on international law. Naturally, the legal literature of Chile, the country being not only smaller but possessing less diversity of economic and industrial interests than the other two, is not so extensive as that of Argentina or of Brazil, but it includes titles of great repute and value. The writings of Chilean publicists have indeed been characterized by thoroughness and care; and, with the single exception of the work of Ciriaco Morelli, professor at the University of Córdoba, on the law of nature and of nations, which was first published in Latin at Venice and has only lately been translated into Spanish, the earliest South American treatise on international law is that of the Chilean, Andres Bello, which appeared in 1832. But, while the work of Morelli is in the main a philosophical disquisition on natural, civil and public law, that of Bello is justly called by Dr. Borchard a "classic treatise" on the law of nations. Editions have appeared in Madrid, Paris, Carácas and Bogotá, in addition to the four that have been published in Chile. Dr. Borchard states that Bello's work "largely influenced our own celebrated publicist, Wheaton, in the latter's work on international law."

The service which Dr. Borchard has rendered in the preparation of the series of guides to foreign law is greatly enhanced by the latest number.

Reprinted from the *Yale Law Journal*, XXVII (1918), 972-973.

MANUEL GONDRA, MINISTER OF PARAGUAY¹

THE account of this luncheon, as given in *The Pan American Review*, opens with the following statement:

One hundred and eight enthusiasts in the cause of Pan-Americanism gathered at the Bankers' Club on Thursday, January 30th [1919] to partake of a luncheon and do honor to His Excellency, Don Manuel Gondra, recently appointed Minister of Paraguay to the United States.

Besides the guest of Honor there were seated at the Speakers' table, President John Bassett Moore, Peter H. Goldsmith, F. C. Nicholas and William Wallace White. The President in his inimitable style introduced the distinguished speaker by referring to the romantic history of the republic in whose name he came to the United States and to the notable career of Doctor Gondra as a scholar and statesman.

Mr. Moore's address of welcome was as follows:

Speaking only of inanimate things, I feel at liberty personally to testify that one of the most delightful objects daily to be seen at the International Exhibition at Buenos Aires, in 1910, was the effigy of a bride draped in lace. It was indeed no ordinary vision. So strong was the verisimilitude, and so striking were the effects, that the beholder seemed in fancy to await the slow procession moving in measured cadence to the music of the hymeneal march. Nor do I intend to depreciate the merits of an important modern industry, when I say that the bridal trappings in the present instance were no machine-made product. On the contrary, they were the work of the human hand, inspired by that innate sense of beauty which, while incurring infinite labor and pains for its own satisfaction, enriches the world with the creations of art. When, however, in the ordinary course of human emotions, the visitor presently inquired as to the origin and significance of what he saw, he learned that it was an ingenious exhibit of Paraguayan lace, of which Buenos Aires and Montevideo were then perhaps the chief markets.

The poet has assured us that "a thing of beauty is a joy for-

1. Address at the luncheon in honor of Manuel Gondra, Minister of Paraguay, January 30, 1919. Reprinted from *The Pan American Review*, I, No. 2 (March, 1919), 3-6.

ever." We accept the assurance; but, as experience unfortunately teaches, we are obliged to accept it with the qualification that joys often linger only in memory. Hence it is that we learn to prize the union of strength with beauty as the ideal combination. And if objects of beauty are produced by Paraguayan hands, so strength may be derived from the products of the Paraguayan soil.

When I say this, I do not speak at random. I approach the subject with a grave and definite purpose, and under the benevolent impression that I may at once confer a boon upon my fellow-countrymen and a favor upon a friendly people. I will therefore proceed to render my meaning intelligible and precise.

The possessor of a well-known name, which, because of its genial associations, is soon to be banished from an important part of the Western Hemisphere, was wont to remark that he had gained his fortune, not by leaps and bounds, but by hops. In the United States this process, which proved to be so successful in the case of Sir Michael Bass, has now been placed under the ban; and having lengthened the Decalogue by Constitutional Amendment, we find ourselves in quest of a universal beverage, tonic in its effects without undue stimulation, that shall preserve beauty, minister to strength, and tint the future with the roseate hues of the dawn. These properties, I venture to affirm, may be found in what is technically called *Yerba Mate*, otherwise known as Paraguayan tea. Often, as the feathered denizens of the forests chanted their vesper song, have I seen the hardy boatmen of the affluents of the Plate produce their simple cups, and, brewing from that native product a delectable draught, return to their sober tasks reinvigorated and refreshed. Wherever tried, its restorative and sustaining qualities have been fully demonstrated. Indeed, we are told that the surveyors of the Argentine-Chilean boundary largely relied upon it for sustenance in the remote and barren altitudes in which they were so frequently obliged to carry on their work.

Paraguay, although she has a past, may be said to be a country of the future. Lying more or less removed from the great lanes of commerce and industry, her resources have to a great extent remained undeveloped; but with the extension of railways and steamer lines, she is beginning to come into her own. With a climate partly tropical and partly temperate, her productive capacities are capable of great development. Her soil may be made to contribute most abundantly to the supply of the world's wants, while her forests, rich in woods of various kinds, will furnish materials essential to the comforts and conveniences of life.

Nor is our interest or our pleasure on the present occasion diminished by the fact that Paraguay, politically speaking, is one of the so-called "Small Nations." This title is by no means derogatory, since it apparently embraces all the nations of the world except the Great Powers which are coming to be irreverently known in the press as the "Big Five." Within that supreme and restricted circle we find unquestionable strength, but not as yet a monopoly of territory or of population, nor by any means a monopoly of virtue. Nor should we forget that, for what may from time to time be lacking in permissive representation, it is always possible to make up something in individual character.

In this high sense, Paraguay is most fitly represented today by the eminent citizen whom we have the honor to entertain. Statesman and diplomatist, he represented his government as minister to Brazil from 1905 to 1908, and was one of its delegates in the Third International American Conference at Rio de Janeiro in 1906. In 1910 he held for a time the exalted post of President of his country. He had previously served for two years as Minister of the Interior. From 1910 till 1918 he held under two successive Presidents the portfolio of Minister of Foreign Relations; and while holding this position he availed himself of the opportunity to extend to the United States, in a great crisis, an expression of the cordial sympathy of his government. His reputation as a scholar, as a historian and as a man of varied accomplishments, has likewise spread throughout the Americas, calling forth many striking and well deserved tributes. We therefore welcome him in his personal as well as in his representative character, feeling that in assuring him of our admiration and respect, we are paying honor where honor is due.

I ask you to rise to the health of His Excellency, Dr. Manuel Gondra, Envoy Extraordinary and Minister Plenipotentiary of our sister Republic of Paraguay.

THE PAN AMERICAN SOCIETY OF THE UNITED STATES

IN February, 1919, there appeared under the auspices of the Society, the executive offices of which were then at 15 Broad Street, New York, the first number of a monthly publication styled *The Pan American Review*.

The official personnel of the Society, embracing the officers of the Society and the members of the Council, was detailed on the inside page of the cover as follows:

Officers of the Society:

President, John Bassett Moore.

Honorary Presidents: Robert Lansing, Secretary of State of the United States; Domicio da Gama, of Brazil, the Ranking Ambassador of Latin America.

Honorary Vice-Presidents: Elihu Root, Andrew Carnegie, Archer M. Huntington, Robert Bacon, Lloyd C. Griscom, Henry White.

First Vice-President, Severo Mallet-Prevost; Second Vice-President, John Barrett; Third Vice-President, Nicholas Murray Butler. Secretary, Harry Erwin Bard; Acting Secretary, John S. Prince. Treasurer, Lorenzo Daniels.

Council (which included *ex officio* the officers of the Society, except the Honorary Presidents and Vice-Presidents): Robert H. Patchin, Chairman; Walter C. Allen, James Brown, Phanor J. Eder, James A. Farrell, Walter E. Frew, J. P. Grace, Hayden B. Harris, Alba B. Johnson, Thomas Kearney, Frederick I. Kent, William S. Kies, Harrison C. Lewis, John R. MacArthur, Samuel McRoberts, James M. Motley, Charles D. Norton, William E. Peck, W. H. Porter, L. S. Rowe, S. G. Schermerhorn, Charles M. Schwab, R. A. C. Smith, James Speyer, Frederick Strauss, Ernest H. Wands, Cabot Ward, J. G. White.

FOREWORD ¹

The objects of the Pan American Society of the United States as set forth in its charter are:

1. To promote acquaintance among representative men of the United States and those of the other republics of America.
2. To show hospitality and attention to representative men of the other republics of America who visit the United States.
3. To take such other steps, involving no political policy, as the Society may deem wise to develop and conserve mutual knowledge and understanding and true friendship among the American republics and peoples.

In carrying out these objects the Society has from time to time specially entertained visitors from the countries of Latin America. During the past year the number of such entertainments has increased, and it is desired that they shall become more frequent in the future. They have embraced men in private life as well as men in public and especially in diplomatic station. In the latter case the entertainment assumes a more formal international character, and it is customary to offer a toast to the President of the United States and the President of the country which the guest officially represents. But this does not imply that the function is political; and in order to avoid involvement with any "political policy," it is not the prac-

1. Reprinted from *The Pan American Review*, I, No. 1 (February, 1919), 2, 3.

tice to offer such a toast where the guest has not an official representative character. The reason is obvious. If such a toast were compulsory in the case of unofficial persons, it would practically preclude the entertainment of any person whatsoever from a country whose government was not at the moment recognized, and would to that extent temporarily deprive the Society of its Pan American character and defeat one of the avowed objects of its existence, especially as the withholdment of recognition might in no way affect commercial and social relations with the country concerned.

Besides extending hospitality, the Society has sought to disseminate information concerning the American republics, in order not only to create a correct understanding but also to serve the convenience of those who are engaged in intercourse between the United States and the other American countries. This work would be greatly facilitated by an augmentation of the Society's funds, through an increase of receipts from memberships and through special contributions to its resources. The ultimate goal of the Society, as an efficient instrument for the promotion of closer inter-American relations, will have been reached, when it shall be able to maintain permanent quarters of its own, large enough to serve as a meeting place for visitors and others specially interested in the American countries, and adapted to entertaining, as well as to the expeditious carrying on of its current work, including that of an informative character.

As a step towards the realization of these aims the Society has undertaken the present publication, which is designed both to keep the members in touch with what the Society is doing and to acquaint them with what is going on in our sister Republics. The *Review* will endeavor to combine personal information with information on governmental, legal and commercial subjects; and the editor will be glad to receive any matter coming within those categories. *The Pan American Review* is in other words a "step," not involving any "political policy," but intended "to develop and conserve mutual knowledge and understanding and true friendship among the American republics and peoples."

THE CHILEAN FINANCIAL COMMISSION¹

WHETHER it is because of the fact that, having been born and reared in rural communities and accustomed to use country roads, I learned to travel only when the weather was fair, or because I have been exceptionally favored by Providence, it has usually been my good fortune first to become acquainted with other lands when the sun was shining and skies were bright. My usual luck attended me, when, nearly nine years ago, my eyes greeted the dawn in the heart of the Andes. A belated train had compelled our party to spend the night just over the line on the western side of the great divide, at an inn whose elevated situation left to the aspiring mind nothing to be desired. In the early sunburst of the morning I caught my first glimpse of the Chilean landscape, and again recalled, as I have so often done in Switzerland, the lines:

“Why cling we to our mountain homes
With more than filial feeling?
’Tis here we tread on freedom’s soil,
With freedom’s banner o’er us streaming.”

The association of an intense local patriotism with high mountains is not strange, especially if they happen to constitute national frontiers. No doubt magnificent views and stimulating air tend to arouse emotion and to create a sentiment of attachment; but, in the history of many countries, struggles for independence and for the defense of home and fireside have at some time been connected with the great natural barriers which inevitably become objectives of military enterprises. Nor, when my thoughts recurred to the lines just quoted, did I fail to recall Bolivar’s prediction that in Chile the spirit of liberty never would be extinguished.

Subsequently, while sojourning at Santiago, the capital, I had an opportunity to witness the proceedings of a political convention held for the purpose of selecting a candidate for the

1. Address at the luncheon in honor of the Chilean Financial Commission, April 21, 1919. Reprinted from *The Pan American Review*, I, No. 4 (May, 1919), 6-9.

The Chilean Financial Commission, one of the most important that has ever visited the United States, is composed of men of international reputation who have taken an active and successful part in the economic development of Chile. Eliodoro Yanez is a senator and former premier of the Chilean Cabinet; Juan Enrique Tocornal, former minister of finance, and Augusto Villanueva, president of the Bank of Chile.

presidency. The contest was conducted with a zest and vigor equalled only by its decorum; and the resulting choice demonstrated the fact that, if the ancient world could boast a hero who began the study of Greek at eighty, the new world need not shrink from comparisons, when it could produce, at the same advanced stage of physical and mental vigor, a statesman who, after a long and distinguished career in the public service, was still adequate to the duties and responsibilities of the highest office in the State. We may therefore say that, if Rome had her Cato, no less has Chile her Barros Luco. Napoleon, when commenting upon the diversities of national fortune, remarked that they were largely to be ascribed to the character of a country's public men. Chile has been fortunate in her statesmen, the commanders of her army and navy, her jurists, her publicists, and historians.

Upon the present occasion, however, our thoughts are necessarily somewhat preoccupied with international and particularly with Pan American relations. In surveying those relations, one is struck with the gradual decline, certainly in a relative sense, of the political quality by which they were at one time almost exclusively characterized. This change has come about in the natural course of development. The American countries have come to look upon one another in a broader way. The interchange of thought has widened their horizon. The study of each other's institutions, not only political, but legal, social and educational, has given them a more intimate view of each other's life and contributed to mutual understanding.

And at length there has come about a marked expansion of commercial and financial relations. This expansion has proceeded not from artificial but from natural causes, and is destined to continue.

The Pan American Financial Conference at Washington, in May, 1915, was but a sagacious recognition of the fact that, while man cannot live by bread alone, he cannot live without it.

Chile's future as a commercial and industrial power lies not behind but before her. She has vast resources. Do we realize the fact that her coast line is longer than the route from New York to Liverpool? And that in this great reach, she exhibits all varieties of soil and of climate? We have all heard of her nitrates, useful in peace as in war. When the kettle sings a cheerful accompaniment to the cricket on the hearth, we perhaps are indebted to copper from her mines. Her mineral wealth also embraces gold, silver, nickel, coal and other invaluable substances. Her extensive forests are almost untouched.

Her fields, her pastures, her fisheries, are capable of great development. Nor do I hesitate to affirm that the reputation abroad of the products of her vineyards is by no means commensurate with their merits.

A great South American statesman, at the opening of the Third International American Conference, well observed that commerce should be regarded as an exchange of benefits. A great statesman and orator, whose name is a household word in the United States, expressed, almost seventy years ago, the same thought, when he thanked God that he was "not among the number of those who regard whatsoever others have as so much withholden from themselves." Those just and generous sentiments constitute but an acknowledgment of that interdependence which ramifies all human relations, whether individual or national. Nations need each other. The American republics need each other; and in the mutual satisfaction of their needs they should find themselves ever more closely drawn together in bonds of interest and of friendship.

In this spirit which should pervade all the relations of the Americas, the Pan American Society today welcomes the Chilean Financial Commission to the financial centre of the United States. In thus limiting my circumference to national boundaries, I would avoid arousing susceptibilities abroad, and trust that I shall excite none at home. But of one thing I can give the fullest assurance. Wherever in the United States they may go, they will find, in the warmth and cordiality of their reception, no diversity of feeling whatever. If in this respect I have ventured to speak for New York, so I may say that New York speaks for the nation.

Let us rise to the health, happiness and success of the Chilean Financial Commission, and to the greatness and prosperity of the country which they so worthily represent.

EXTRATERRITORIALITY, AND ITS RELATION TO EXPATRIATION

BY the first treaty between the United States and China, which was concluded in China on July 3, 1844, it was stipulated that subjects of China, charged with crimes toward citizens of the United States, should be tried and punished by the Chinese authorities in accordance with the laws of China; but that citizens of the United States committing crimes in China should be tried and punished "only by the Consul or other public functionary of the United States, thereto authorized, according to the laws of the United States." In this the United States followed the example set

by Great Britain in her treaty with China two years before. Other countries did likewise, and in due course, the seclusion of China having been broken, there was established the system of extraterritoriality, under which aliens were subject to the laws of their own country as administered by judges from their own country, who, unless it created a special tribunal, were usually the minister and consuls.

In 1918 Robert Edmund Lee, a native-born citizen of the United States, who had resided in China for thirty-eight years, and who was, for the greater part of that time, a missionary, died there leaving a will, for the probate of which application was made to the United States Court for China. The Department of State, at Washington, had previously refused to extend protection to Mr. Lee on the ground that he had, by his permanent residence abroad, expatriated himself, so that he was no longer to be considered as a citizen of the United States. Nevertheless, on an application to the United States Court in China, Judge Charles Sumner Lobingier, the presiding Justice, held that Mr. Lee had not lost his American citizenship, and, in so deciding, particularly invoked Section 2 of the Act of Congress of March 2, 1907, which, while enacting that, when a naturalized citizen of the United States should have resided for two years in the foreign state from which he came, or for five years in any foreign state, he should be deemed to have ceased to be an American citizen, explicitly provided that such presumption might be overcome on presentation of satisfactory evidence to a diplomatic or consular officer of the United States that he had not lost his American citizenship.

On receiving from Judge Lobingier a copy of his opinion, Mr. Moore wrote him as follows:¹

"Not only do I consider your conclusions to be correct, but I welcome them as an authoritative contribution towards the establishment of a distinction which is too little understood.

"In my *History and Digest of International Arbitrations* I devoted an entire chapter (Vol. III, chap. 56) to the 'Renunciation or Forfeiture of the Right to National Protection.' I used this phraseology for the purpose of opening the way to the correction of the supposition, which has so extensively prevailed in judicial and diplomatic utterances, that the refusal to extend protection to a citizen could be justified only on the ground that he was 'expatriated,' in the sense of having lost his citizenship. I make the same distinction in my *Digest of International Law*, III, 757-790. It seemed to me that one of the few improvements made by the Act of 1907 in pre-existing law was the fact that it recognized, perhaps unintentionally, that distinction.

"So far as concerns the courts, the confusion in which the subject has been so generally enshrouded is largely due to the unprecise and more or less promiscuous use of the terms citi-

1. *American Bar Association Journal*, V (April, 1919), 210-211.

zenship, domicil and expatriation. Citizenship has been used in the sense of domicil, domicil has been used in the sense of citizenship, and expatriation has been used indiscriminately to denote changes of citizenship and changes of domicil.

"So far as concerns the executive department, there has been a special confusion chiefly due to a misinterpretation of the statutory requirement, based on the Expatriation Act of 1868, that no distinction shall be made in the treatment of native citizens and of naturalized citizens abroad. On the assumption that this meant that no account was to be taken of the circumstance that the one was a native and the other a naturalized citizen, our Secretaries of State have in fact often subjected the native citizens to a discrimination for which there was not the slightest legal justification. Our naturalization treaties, with perhaps a single exception, have incorporated the principle that a naturalized citizen permanently returning to the country of his origin is to be considered as having renounced his naturalization. This rule has a justification in law as well as in common sense. But to say that a native citizen who goes to reside even permanently in a country that never had a claim to his allegiance should be treated as if it were the country of his original allegiance, is justified neither in law nor in common sense. Whenever I have had an opportunity I have endeavored to impress these considerations upon those in authority. Your compact and well-reasoned judicial opinion will, I believe, be of great value in clarifying the thought of those who have to deal with a subject which has been so much misapprehended."

THE FIRST PERUVIAN AMBASSADOR¹

AMONG the convenient and veracious methods of procedure to which the exigencies of law-making bodies have given rise, there is the familiar device of setting back the hands of the clock. Standing in the presence of a former President of the Chamber of Deputies of Peru, I do not undertake to state whether such a practice prevails in that country; but I feel free to say that it is followed in the United States in order that, without regard to the alternations of light and of darkness which mark the open processes of legislation, the day may be made continuously to subserve the purposes of the

1. Address at the luncheon in honor of Francisco Tudela y Varela, First Peruvian Ambassador to the United States, May 20, 1919. Reprinted from *The Pan American Review*, I, No. 5 (June, 1919), 11-12.

hour. Relying upon this well established precedent, I will ask you to discard the supposition that you are assembled on the 20th of the current month, and to consider yourselves, for the purposes of the hour, as being in continuous session on the 17th of May. I make this request in order that we may couple with the present occasion the celebration of the 375th anniversary of the entry of the first Spanish Viceroy into Lima.

Only to think of it! In the United States we often flatter ourselves upon the possession of perhaps two generations of American ancestry. Even if we go back to the hallowed spot where the Pilgrim first bestowed his faith upon the bewildered and reluctant Red Man in exchange for the latter's land, we are still almost a century short of the time when Pizarro first set foot on Peruvian soil, or when, twelve years later, Don Vlasco Nuñez Vela set up his viceregal throne at the Peruvian capital.

It is well to bear these things in mind; for, while one can not, even though his ancestors happened to be thrifty, live wholly upon the memories of the past, yet those memories go to make up that consciousness of history, which, in spite of what popular orators and shallow philosophers may say, must ever exert a powerful influence upon a people's destinies. We hear much of the rise and fall of nations, and, absorbed in the compulsive preoccupations of the moment, which leave little opportunity for reflection, are prone to look upon present conditions as a permanent consummation of finality, thus forgetting that, in spite of all material changes, the spirit of man, which cannot be confined by political boundaries, goes on forever, and that, in the yearnings and strivings of the human spirit there resides the power of immortality. The resurrection and the principle of authority of the first Spanish Viceroy at Lima embraced all South America. The vast domain over which he ruled is now the seat of ten Republics, nine of which trace their origin to colonists from Spain. But the seeds of the new civilization implanted there almost four hundred years ago continue to germinate, and to create thoughts and sympathies which have survived and which will continue to survive all political mutilations.

The country to whose distinguished representative we pay honor today has, like other nations, had its days of prosperity and its days of adversity. It has indeed suffered at times from an excess of prosperity, causing a certain obliviousness of the importance of using for the development of national self-sufficiency a due proportion of the proceeds of natural wealth. A marked change in this respect is coming about in more than one of the countries of South America; and it will in the near future be greatly accelerated by the investment of capital. For

the purposes of commerce the situation of Peru is exceptional. Although she borders on the Pacific, one can make from her eastern side a continuous voyage to Europe by way of the Amazon. The lively interest she has long shown in the creation of an adequate system of railways is well known. In recent years appreciable progress has been made in the establishment of local industries, for which her extensive and varied resources offer rich and generous supplies of materials. The possibilities of her agriculture can scarcely be over estimated. Her dry zone, like our own vast area formerly known as the Great American Desert, requires only irrigation to make it bring forth in abundance, while her high table-lands are exceedingly fertile. Her mines have for centuries been famous. Of the forests on her eastern slope it is superfluous to speak. Millions of men all over the world—the chattering, fevered victims of malaria—have learned to bless the name of Peruvian bark. Nor should the votaries of fashion withhold their tribute. I would detract nothing from even the nominal distinctions of the youngest of the American Republics, whose advent we watched with perhaps less than our habitual detachment; but it is a fact that one cannot always be sure that his Panama hat did not come from Payta.

In our international annals the name Peru is associated with a long and unbroken friendship. The record of this friendship is found both in the diplomatic correspondence between the two countries and also in their treaty stipulations, which have been characterized by mutual confidence and reciprocal liberality. The treaty of commerce of 1851, which has served as a model for subsequent conventional arrangements between the two countries, incorporated the most-favored-nation principle. Adopting as its standard the rule that had come to prevail among nations professing to be civilized, it forbade the confiscation of private debts or private property. Furthermore, it provided that, if a charge of violation of its terms should be made, neither party should resort to any act of reprisal or of war without having first sought satisfaction of its complaints by statements verified by competent proofs. In harmony with this stipulation, we find that, where differences have arisen, they have been settled by impartial arbitration, of which we trace in the intercourse between the two countries numerous examples. In one case, relating to the seizure of the vessels *Georgiana* and *Lizzie Thompson*, the United States, having become convinced that the claim was not well founded, withdrew it from the arbitrator and renounced it. I particularly advert to this fact because several years ago I read in a learned and laborious source of misinformation called an encyclopedia,

the statement that Peru had eventually yielded to the representations of the United States and paid the claim.

Reviewing the relations between our two countries, I venture to say that the spirit which has pervaded them is most happily exemplified in the character and the career of the guest of the day. I have spoken of the antiquity of his country; and we may readily believe that, among the treasures which it holds, none is more cherished than the ancient institution, the first of its kind in America, the University of San Marcos, founded by Charles V. Of this renowned seat of learning His Excellency is an alumnus. Setting out in public life in the diplomatic service, he has in the course of his brilliant career filled with ability and distinction numerous high positions both in the legislative and in the administrative branch of the government. Repeatedly elected a member of the Chamber of Deputies, he became the presiding officer of that body. He has thrice been a member of the Cabinet, once as Minister of Finance and twice as Minister for Foreign Affairs. His appointment as the first Peruvian Ambassador to the United States may justly be regarded not only as the reward of eminent and useful public service but also as a manifestation of the respect and good-will of the government and people of Peru towards the government and people of the United States.

I ask you to rise to the health of His Excellency, Dr. Francisco Tudela y Varela, whom we delight to honor both as a man and as the accomplished representative of our sister Republic of Peru.

EPITACIO PESSOA OF BRAZIL¹

IF I admit that, when I speak of Brazil, I scarcely know where to begin, I would not have it supposed that I do not know where to end. Be not alarmed! My uncertainty as to the starting point is due solely to the fact that even if we recur to the time, almost four hundred and twenty years ago, when Pedro Alvares Cabral first cast his eyes on the Brazilian shores, we must still go centuries back to trace the origin of the civilization which his countrymen implanted in the then unexplored wilds of the American continent.

For, in speaking of Brazil on the present happy occasion, I am not thinking of that great country in terms of commerce or

1. Address at the luncheon to President-Elect Pessoa of Brazil, June 26, 1919. Reprinted from *The Pan American Review*, I, No. 6 (July, 1919), 7-8.

of geography. We all know how vast is its territorial extent. We have all heard that, if it were placed over the continental area of the United States exclusive of Alaska, there would be a substantial overlap; and that it presents all phases of soil and of climate.

We are also well aware that in the history and the relations of the two countries there have been many coincidences and many striking incidents. Reference was made yesterday by His Honor, the Mayor, to the circumstance that during a part of the seventeenth century Brazil and New York both were ruled by the Dutch—a very comforting reflection at the present moment, since, if the two countries should again need to be ruled from abroad, the League of Nations would know where to obtain for them a common and experienced mandatory.

We have also often heard that the United States was the first government to recognize the independence of Brazil; and that reciprocally Brazil was the first government to recognize and invoke the Monroe Doctrine. No doubt some of those who are present today—and I confess that I am one of the number—can recall the visit paid to the United States by the Emperor of Brazil, Dom Pedro II, on the occasion of our Centennial. I trust that I shall not shock the highly trained representatives of the Department of State now present, if I repeat the tradition, which still prevailed in the Department when I first served in it, that when His Imperial Majesty, who was traveling *incognito* and without ceremony, called there unannounced on a warm Summer's day, he was promptly received, to his great amusement and satisfaction, by the ranking official then in charge, that most useful public servant, the late William Hunter, in a black alpaca coat and carpet slippers!

Today we are honored with the presence of the President-elect of the Brazilian Republic! Again I come forward as a personal witness, to speak of the circumstances of the change. It came suddenly; and, as if in a twinkling, the first international conference of American States, which was then sitting in Washington, became a conference of Republics. The change was inspired by that idealism which is a trait of the Brazilian character—the trait that brought about in Brazil the peaceful abolition of slavery, and that caused to be inserted, in the Constitution of the Republic, a prohibition of wars of conquest. It was a change effected, as the flag of the Republic proclaims, in the name of order and progress; and was designed to be constructive and not subversive. In harmony with this high purpose, the first spokesmen of the new government at once announced to the world: "The Republic respects strictly all engagements and contracts entered upon by the State."

It is evident that legality, and respect for obligations, legal and moral, are regarded as an integral part of Brazilian idealism. It is therefore only natural to find, as we do, that the country has produced great lawyers and great students of jurisprudence, among whom our guest of honor stands in the foremost rank. It may justly be said that one of the most successful products of modern codification is the Civil Code of Brazil, proclaimed in January, 1916. One of the most effective steps toward its completion was that taken by Dr. Pessoa, when Minister of Justice; and he himself served as a member of one of the commissions by which it was formulated. The law schools of the country are renowned for the liberality of their courses and the learning of their faculties. Among these I may mention that of Recife, of which Dr. Pessoa is an alumnus, and the law faculties of Sao Paulo, Rio de Janeiro, and Bahia.

I wish there were opportunity to speak of the historians and men of letters of Brazil, and of her poets. Perhaps I may be pardoned if, recurring again to personal experience, I refer to the circumstance that, on visiting Brazil in 1912, I found the country vibrating with the latest sonnet of Bilac. A new poem by that great master was an event, not only in Brazil but in the entire Portuguese-speaking world. He has since paid the great debt to nature, again illustrating the glorious truth that, although our bodies must return to dust, genius is immortal.

Standing in the presence of one who, if he had not reached the highest point of political preferment, would still be acclaimed as a consummate product of his country's intellectual and spiritual life, I am happy to think and to speak of Brazil today in terms of her highly developed and well rounded civilization; of the achievements of her statesmen, her jurists, her orators; of the works of her writers, and the songs of her bards. Most heartily do I associate my country with his, and ask you to rise to the progress, prosperity and friendship of these two great Nations and the health and happiness of their Chief Magistrates.

ADDRESS OF WELCOME TO THE GUATEMALAN DIPLOMATIC MISSION¹

IN the name of the Pan American Society of the United States, and of its constituent membership in all parts of the country, I desire to say that we esteem it a high priv-

1. December 6, 1919. Reprinted from *The Pan American Review*, I, No. 11 (December, 1919), 6-7.

ilege as well as a great pleasure to entertain the Special Mission from our sister Republic of Guatemala. What we now call Central America was formerly known as the Center of America, and to-day we all converge our gaze upon that interesting and pivotal point in the Western Hemisphere.

Nor is our gratification lessened by reason of the fact that the republics constituting Central America are in the particulars of territory and population classed among the smaller states of the world. The importance of countries is not to be measured solely by area and numbers. The civilized states of the world form a society in which each integral element has its place and plays its part. Moreover, the rights of all are equally sacred. John Marshall, often called the "great" Chief Justice of the United States, once declared that "Russia and Geneva have equal rights." This celebrated utterance of a profound statesman and jurist continually reverberates through the world to remind men that physical power cannot be permitted to be the exclusive arbiter of the fate of nations.

The presence of the Guatemalan Mission in the United States to-day significantly reflects this sentiment. Its presence is a token of friendship and of mutual confidence. The cordiality of the relations between Guatemala and the United States is a well-known fact. It is a long-existing condition, which the visit of the Special Mission fortunately is not needed to create, but is intended only to attest.

The President of Guatemala has been happy in the selection of his representatives. This is by no means a new thing, for I have constantly had occasion to observe, in the international conferences in which I have participated, the intelligence and the high character of the representatives of Guatemala.

This marked standard of excellence has been fully maintained in the personnel of the present Special Mission, in which the executive, the legislative, and the judicial branches of the Government are all represented.

The members of the Mission are so well-known that no elaborate detail of their respective careers is requisite. But I should withhold honor where honor is due, if I failed to pay tribute to the fame of Mr. Soto Hall, the Chairman of the Mission, in the fields of literature and of science. The depth and the variety of his learning are exemplified in many volumes, embracing poetry as well as prose. Being myself a somewhat voluminous author, I might regard him with envy, as a formidable competitor of the book-shelves, but for the fact that one of his works has run through ten editions. By this test, to say nothing of any other, I am obliged to admit that I have been fairly distanced. Moreover, besides being an orator of repute, he is also

an experienced diplomatist, having served as Secretary to the Guatemalan Legations in France, England, Germany, Italy, Portugal and Spain, and later as Minister to Venezuela, to Panama, and to other American republics. His merits and attainments have been recognized by many learned societies in Europe and in America.

Mr. Girón, his worthy associate, specially represents the Legislature of his country. He, too, has had a long and honorable career in the service of his Government. Not only has he been Mayor of the capital of his country, and Director of Custom and Treasurer-General of the Republic, but he is also experienced in diplomacy, having held, among other positions abroad, the important post of Guatemalan Minister to Mexico.

Mr. Serrano, as a member of the Supreme Court of Guatemala, was fitly chosen to represent the judiciary of his country. In these days, when emotions have been deeply stirred and the excitements due to war have not yet passed away, we look to our judicial magistrates to administer the law with calmness and impartiality. The judge who, while declining to assume powers which he does not legally possess, firmly maintains the jurisdiction with which he has been actually endowed, makes an important contribution not only to justice but also to the general tranquillity. He stands as the embodiment and the assurance of that fair and orderly dealing between man and man, under laws duly ordained, on which civilized society in the last analysis always must rest.

Greeting the guests of the day both as authorized representatives of the Government of an American country whose friendship has long been cherished, and as distinguished exponents of their country's political, social and intellectual life, I ask you to rise to the health of the Guatemalan Mission.

SOME ESSENTIALS OF A LEAGUE FOR PEACE¹

ON a certain occasion John Bright, referring to the variant explanations of a measure pending in the House of Commons, recalled Addison's story of the man who did a thriving business by selling pills which were said to be very good for the earthquake. It would be a profound mistake to dismiss this story as a mere jest, since it but illustrates the

1. Chap. iv of *The League of Nations: The Principle and the Practice*, ed. by Stephen Pierce Duggan (Boston, Atlantic Monthly Press, 1919), pp. 64-81.

universal human tendency to be fascinated by mystery, and to indulge expectations of good in inverse ratio to actual knowledge of the professed agencies by which it is to be brought about.

To-day we witness a striking example of this primitive tendency. At every turn we are accosted with the inquiry, "Are you in favor of a league of nations?" As this inquiry is made with evident seriousness, we must assume that those who make it are unconscious of the fact that an affirmative response would only betray the presence of another would-be purchaser of seismic pills. In reality, it would be as sensible to ask, Are you in favor of "alliance"? Are you in favor of "contract"? Are you in favor of "correspondence"? In a word, it would be just as sensible to inquire whether one is in favor of, or opposed to, any of the various processes by which men and nations are accustomed to conduct their relations one with another.

General Definition. While many persons, of whom I am one, are in favor of international organization to secure the observance of law and the preservation of peace, the phrase "league of nations" bears to this question no certain relation. In reality, it conveys, in and of itself, no definitive meaning. The word "league" is nothing but another name for an alliance. It has usually been applied to alliances of a more important or more extensive kind. Among the Greeks there were various "leagues," such as the Achæan League and the Amphictyonic League. We find the same term all through history, ancient and modern. There was the League of Cambrai and the League of Augsburg. In the sixteenth and seventeenth centuries there were several leagues called "holy"; while among the leagues of the last century, which were sometimes known by other titles, there was the celebrated Holy Alliance.

The Holy Alliance. Because of the tendency of international combinations of power to impose their will on those outside their circle, and by resisting change, even in the internal affairs of independent states, to become the agents of reaction, the Holy Alliance is not to-day held in grateful remembrance; nor are its authors even accorded the credit due them for the benevolence of their intentions. The Holy Alliance was an outgrowth of the agonies of the wars, lasting almost a quarter of a century, which resulted from the action of the European league formed for the suppression of the Revolution in France. At the close of the great struggle which this act of intervention entailed, there was a general longing that the world might regain its tranquillity. This feeling pervaded the victors as well as the vanquished; and it induced the Emperors of Austria and Russia and the King of Prussia—the idealistic Alexander I of

Russia being the moving spirit—to join in a solemn act, in which, while avowing their “fixed resolution” to take as their “sole guide” in all political relations, both internal and external, the Christian precepts of Justice, Charity, and Peace, as being “the only means of consolidating human institutions and remedying their imperfections,” they pledged themselves on all occasions and in all places to aid each other “to protect Religion, Peace and Justice.” This they were to do in the spirit of “reciprocal service,” as “members of one and the same Christian nation.” All powers which should choose to avow these “sacred principles” were to be “received with equal ardor and affection into this Holy Alliance.” Although the King of Great Britain, because a constitutional formality stood in the way, did not personally sign the act, the British government for some years co-operated in the proceedings by which the league regulated the affairs of Europe. The restored monarchy of France was also in due time admitted to its councils and activities, and in April, 1823, discharged, as the “mandatory of Europe,” the high function of invading Spain and “liberating” Ferdinand VII from constitutional trammels.

From this position to the tranquillizing of Spanish America was a natural and easy step. The views of Alexander I indeed embraced the entire world, and looked to the creation of a universal union. He therefore approached the United States on the subject of the disorders in Spanish America, commending the principle of intervention as a guaranty of peace. Great Britain, indisposed to yield the rights of trade which she had acquired in the Spanish-American countries, had given notice that she would regard any intervention in their affairs as presenting an entirely new question, on which she would take such action as her interests might require. The public response of the United States was made in the celebrated message of President Monroe of December 2, 1823, announcing what has since been known as the “Monroe Doctrine.” The American people, having proclaimed the revolutionary principle that governments derive their just powers from the “consent of the governed,” inevitably regarded with suspicion and with apprehension any programme, no matter how it might be labeled, which comprehended what John Quincy Adams described as “forcible interposition to guarantee the tranquillity of all the states of which the civilized world is composed.” The Government of the United States, mindful of its own recent and revolutionary origin, instinctively supported the right of every independent people to determine its own form of government. It had received in 1793 the representative of the revolutionary government in France. In 1822 it began formally to recognize the rev-

olutionary governments in South America. It knew no distinction between governments *de facto* and governments *de jure*.

The distinctive combination known as the Holy Alliance may be said to have reached its high-water mark in the Congress of Aix-la-Chapelle of 1818. As is shown by Phillips, in *The Confederation of Europe*, the Alliance was at that period "looked upon, even by British statesmen, as something more than a mere union of the Great Powers for preserving peace on the basis of the treaties." In effect, it acted, as he observes, "not only as a European representative body, but as a sort of European Supreme Court, which heard appeals and received petitions of all kinds, from sovereigns and their subjects alike." Mediatized princes, the mother of Napoleon, the people of Monaco, invoked and received its consideration. Questions of diplomatic rank, claims of succession, the suppression of the slave-trade, the right of search, complaints as to the Barbary pirates, were brought forward and dealt with; while the King of Sweden, reinforced by the King of Württemberg, protested against the "dictatorship" arrogated to themselves by the Great Powers.

The Concert of Europe. But, while the Holy Alliance, of which Phillips somewhat censoriously speaks as "the visionary good in the pursuit of which" Alexander "had neglected his duties to his own people," eventually fell to pieces without accomplishing the ultimate object of its chief designer, the principle of association for common action, with which it was identified, by no means perished with it. Having survived the various leagues and alliances with whose wreckage the centuries were strewn, this ancient principle later emerged in the youthful trappings of the "Concert of Europe," in which new garb the European system, based upon and regulated by treaties, and constituting a league of nations for the preservation of peace, continued to carry on its work. This system, originally embracing the Christian powers of Europe, was enlarged in 1856 by the admission of Turkey. The precise words were that the Sublime Porte was "admitted to participate in the advantages of the Public Law and Concert of Europe." Twenty-two years later, in 1878, the European structure, whose foundations several intervening wars had again seriously impaired, was remodeled by the Treaty of Berlin. But, in spite of all guaranties, the process of change, of which history is but the record, went heedlessly on.

The Hague Conferences. In 1898 the world was startled by the invitation issued by the Tsar of Russia for a conference to consider the limitation of armaments. The result was the Peace

Conference at The Hague in 1899, in which, as the invitation was delivered only to the countries diplomatically represented at St. Petersburg, the United States, China, Japan, Mexico, Persia, and Siam, were the only non-European participants. The Second Hague Conference, which was held in 1907, had the character of a world conference, all parts of the globe being represented in it and participating in its decisions and final acts. But the most notable achievement of the conferences belongs to the Conference of 1899. This was the adoption of the Convention for the Pacific Settlement of International Disputes, under which there was set up the Permanent Court at The Hague.

The Hague Conferences did not undertake to deal with political questions. To a certain extent they undertook to formulate rules of international law, especially with reference to the conduct of war. It was hoped that a third conference would be held in 1917; but, as time wore on, the prospects became clouded. Clashes of interest occurred. Mutterings of strife were heard. Morocco became a storm-center. Tripoli became the theatre of hostilities. Wars broke out in the Balkans. And at length there burst the great cataclysmic struggle, from whose vortex the world, bewildered, forgetful, and susceptible to desperate suggestions, has not yet fully emerged.

America's Conception of a League of Nations. We are told that history repeats itself. This is true, although many persons seem not to believe it. But the rule would have failed if we had not seen, since the outbreak of the war in 1914, the revival and multiplication of proposals for a league of nations to prevent the recurrence of such a catastrophe. I have remarked that the phrase "league of nations" conveys in itself no definitive meaning; but I believe it may be affirmed that it connoted, at least in the United States, in the minds of many, if not most, of those who employed it, a certain and definite supposition. This was an association of all the powers of the world in a league whose chief object should be the prevention of war. It is true that it was occasionally suggested, by some of the advocates of a league to "enforce" peace, that this object would be attained by an alliance between the United States and the Entente Powers. This conception rested upon the singular assumption that, if the United States had prior to 1914 formed an alliance with Great Britain, France, and Russia, nothing would have been done by other Powers to enlarge and consolidate the opposition. But it suffices to say that this conception of a league of nations was not that which influenced the great bulk of those who advocated a league for the preservation of **peace**.

By no one was this distinction more clearly drawn than by President Wilson. In his address to the Senate of January 22, 1917, on a League of Nations, he declared:

Mere agreements may not make peace secure. It will be absolutely necessary that a force be created as a guarantor of the permanency of the settlement, so much greater than the force of any nation now engaged or any alliance hitherto formed or projected, that no nation, no probable combination of nations could face or withstand it. If the peace presently to be made is to endure, it must be a peace made secure by the organized major force of mankind.

The terms of the immediate peace agreed upon will determine whether it is a peace for which such a guaranty can be secured. The question upon which the whole future peace and policy of the world depends is this: Is the present war a struggle for a just and secure peace, or only for a new balance of power? If it be only a struggle for a new balance of power, who will guarantee, who can guarantee, the stable equilibrium of the new arrangement? Only a tranquil Europe can be a stable Europe. There must be, not a balance of power, but a community of power; not organized rivalries, but an organized common peace.

In his four cardinal points of February 11, 1918, he referred to the "game, now forever discredited, of the balance of power."

Again, in his Liberty Loan Address at New York on September 27, 1918, President Wilson was still more explicit. Speaking on that occasion of a "league of nations" as an "indispensable instrumentality" of a "secure and lasting peace," he said:

And, as I see it, the constitution of that League of Nations and the clear definition of its objects must be a part, is in a sense the most essential part, of the peace settlement itself. It cannot be formed now. If formed now, it would be merely a new alliance confined to the nations associated against a common enemy. It is not likely that it could be formed after the settlement. It is necessary to guarantee the peace; and the peace cannot be guaranteed as an afterthought. The reason, to speak in plain terms again, why it must be guaranteed, is that there will be parties to the peace whose promises have proved untrustworthy, and means must be found in connection with the peace settlement itself to remove that source of insecurity. It would be folly to leave the guaranty to the subsequent voluntary action of the governments we have seen destroy Russia and deceive Roumania.

In view of what has been stated, it is plain that what has generally been understood by a league of nations is a world league. In any other sense the use of the phrase is essentially deceptive. If a combination of two nations, or of a certain group of nations, to the exclusion of other nations, were intended, in order that there might be set up a new balance of power, the fact should be conveyed by a proper descriptive title, for which appropriate words are not lacking. In this rela-

tion, however, we should not overlook the astute distinction, now sometimes heard, that a "preponderance" of power would not be a "balance" of power. The suggested distinction is unkind to the living and unjust to the dead. We should not ascribe to the designers of "balances" of power, either past or proposed, the imbecile intention to create only a "balance" as distinguished from a "preponderance"; nor have their performances or proposals justified such an imputation. On the contrary, the design to create a "balance" has not deterred them from loading their scale-pan with all the weights they could secure, nor have they believed that they had a "balance" till the beam inclined in their favor. They have rather conceived of a "balance" in the accountant's sense of a substantial preponderance or comfortable reserve on the credit side, which might be drawn upon for working capital.

Desirability of a League. Now, when we come to deal with the question whether a league of nations is desirable, the answer necessarily must depend upon what the league contains and what it proposes to do. Just as an individual's freedom of action is constrained by any contract that he may make, so a nation's freedom of action is constrained by any league or alliance into which it may enter. Whether the sacrifice is desirable, or even justifiable, depends upon the nature of the object in view and the character of the engagement by which it is sought to be attained. Mere engagements, whether individual or national, are, as such, neither good nor bad. They are good or bad according to their objects and their contents. No title, no formula, can be endowed with magic force to guide the minds of men in paths of justice, tranquillity, and peace. Wars are precipitated by psychological conditions, sometimes stimulated by ambition, but in the main produced by rivalries, by misunderstandings, by injuries and oppressions, real or fancied, and by a sense of resentment.

The causes that operate to produce international wars likewise operate to produce civil wars. It is important to advert to this fact, no matter how obvious it should be, because, in discussing the question of war and peace, people seem so generally to lose sight of the circumstance that, during the hundred years succeeding the Napoleonic wars, civil wars were perhaps more frequent than international wars, covered as many years, and claimed as many victims. It is doubly important to bear these things in mind, not only in estimating the possibility of preventing war and the probable value of any particular contrivance for that purpose, but also in determining what a league of nations must comprehend in order that it may have a salutary effect.

Methods of Action. Such a league must necessarily embrace all the methods by which tranquillity is sought to be maintained within national boundaries. We often speak of the separation of the powers of government into three divisions, executive, legislative, and judicial. We may leave it to those so inclined to debate the question whether this distinction is always actually maintained. It suffices for the present to say that the so-called separation of powers does denote three distinct methods of action, all of which are essential to the maintenance of orderly political and social conditions. Laws need to be definitely declared, and, as the world will not stand still, they also require adjustment to changed or changing conditions. We therefore need in the international, as well as in the national, sphere the legislative function, so organized that it can produce results. Then, if we have laws, some authority must be invested with power to administer and apply them. For this it will not suffice merely to provide some functionary with a military or a police force. It is not difficult to forecast what would happen, if, in a particular country, in time of peace, the legislative and judicial organs of the government should be superseded by a small executive body, with supreme power to render decisions and an army and navy to enforce them. Unless the administration of the laws is to provoke discontent and revolution, the painstaking investigation and impartial decision which characterize the proceedings of judicial tribunals must play an important part in their enforcement.

In spite of the setting up of the Permanent Court at The Hague, I do not hesitate to affirm that there has been a tendency in recent years, perhaps somewhat due to unreasonable expectations formed of that tribunal, to belittle the judicial function as exemplified in international arbitration. This attitude is not justified by the results of arbitration where it has been tried. The main difficulty has been in inducing nations to forego the chance of gaining by arms what they feel they are likely or sure to lose by an impartial judgment. In order to meet this difficulty, an effort has been made to supplement the Convention for the Pacific Settlement of International Disputes, of 1899, under which the resort to arbitration is wholly voluntary, with treaties making the resort to arbitration compulsive. But the effort cannot be said to have been successful. Most of the treaties concluded for the purpose, by reason of their express exclusions, left nothing of serious importance within the scope of the obligation. Thus, while they added nothing to the practical efficiency of the system, they lowered the standard and discredited the process in the public estimation. On the other hand, treaties of a more adequate type in

notable instances failed to be ratified. It follows that, in any league for the preservation of peace, the judicial method of settling disputes remains to be dealt with in a comprehensive and effective way.

Nor is the process of conciliation to be neglected, including good offices and mediation, and the impartial examination, by appropriate tribunals, of the causes of controversy. This last purpose the clauses of The Hague Convention relating to international courts of inquiry, as well as the so-called Bryan treaties, often erroneously described as unlimited treaties of arbitration, were designed to subserve.

Preponderant Force as a Deterrent. When we come to the mere combination of power, to be exerted in concert through diplomatic and military agencies, the European system, from which the United States has heretofore held aloof, furnishes a long and ample experience. The part which force plays in the affairs of the world is a much mooted question; and it is evident that opinions differ as to the extent to which force can be relied upon for the preservation of peace. From the fact that, when armed conflicts take place, the issue will be decided by the strongest battalions, the inference is often drawn that in the last analysis the world is governed by force. But, even granting this inference in the very terms in which it is stated, it by no means follows that, because preponderant force will end a war, it can be relied upon to insure peace.

Such a conclusion involves more than one vaulting assumption. One of these is that men in the mass, constituting a great nation, can be controlled with the same promptitude and effectiveness with which an individual, charged with a violation of law, can be arrested in the street and brought to justice. The futility of such a supposition is remarkably demonstrated by what took place in Europe during the twenty-five years that succeeded the French Revolution. In 1793 France, then threatened with a shortage of food, was confronted with practically a united Europe, with the world's greatest maritime power at the head of the coalition. And yet, with the exception of the brief respite following the peace of Amiens, the war continued twenty-two years, and in the end France emerged from the conflict with her boundaries scarcely diminished. This example, which is not incapable of repetition, may be commended to those who imagine that the affairs of great nations, internal as well as external, can be peacefully regulated by leagues or alliances, redeemed or unredeemed by the prefix "holy."

Another such assumption is the supposition, quite unfounded in human experience, that a people, laboring under a sense of grievance, will be deterred by a disparity of numbers and of

force from incurring the hazards of a conflict. All history teaches the contrary. On this point the lessons furnished by America are peculiarly impressive. The patriots of 1776 took a desperate chance, and won; the leaders in the movement for secession took a chance apparently less desperate, and lost.

Effect of Change on a League. Again, history teaches that all human combinations are subject to mutation. This is peculiarly so, where the constituents are not united by common interests and inspired by common ideals and aspirations. One of the gravest dangers that any association of nations must always encounter is the tendency to divide into groups, and to form balances of power, based on particular interests and sympathies which are held paramount to the general interest. An impression indeed seems now to prevail that the balance of power is an artificial contrivance employed to defeat the instinct of concert among nations. The truth is precisely the reverse. Balance of power is the instinctive measure; concert is the artificial contrivance employed to counteract that instinct. What is called the balance of power is merely a manifestation of the primitive instinct of "self-defense," which so often manifests itself in aggression. The man who boasted that he had taken part in eighteen wars and fought twenty-seven duels, "all, suh, in self-defense," though no doubt sensitive, probably was sincere. The defensive instinct tends to produce combinations in all the affairs of life and in all human relations. It operates within nations as well as between nations. The Civil War in the United States was the result of a contest over the balance of power. Nor has the principle since ceased to operate in the United States. The fact is notorious that certain sections of the country have, during the past generation, constantly found themselves in general relations of mutual support because of a continuing common interest in a single question.

Fortunately, such combinations in internal politics, where the ballot exists, normally, though by no means always, seek to gain their ends by that peaceful agency; but if the ballot is not available, they readily resort to the bayonet. Combinations for a "balance" or "preponderance" of power in the international sphere primarily typify, on the other hand, the thought of "bayonets first," and, constituting a challenge to the rest of the world, provoke counter-combinations of power looking to the eventual and inevitable conflict. It is evident that, if an organization for peace is to break this monotonous round, it can do so only by being fairly representative of the entire world, and by providing for the adjustment of relations and the settlement of differences by methods which inspire confidence in their disinterestedness and impartiality. We accept it as axio-

matic that no man is fit to be the sole judge of his own cause. The man who seeks so to act impeaches his sense of justice, if not the integrity of his motives. The axiom is no less applicable to nations, whether singly or in combination.

Determining Responsibility for War. Another problem—with which a union of nations for the preservation of peace must deal, is that of determining the responsibility for armed conflicts. It is much to be deprecated that recent events have tended to create the hasty impression that, when war breaks out, it will always be clear which one of the parties began it. This supposition betrays a lack both of perspective and of familiarity with the origin of wars.

Ward, in his *Law of Nations*, narrates how, in 1292, two sailors, the one Norman, the other English, quarreled in the port of Bayonne and began to fight with their fists. In the affray one stabbed the other. The fight spread to the ships of the two countries in the harbor, then to the high seas, and, continuing to grow till it involved the two governments, resulted in the war which, by the loss of Guienne, entailed upon the English and the Normans the train of hostilities which eventuated in the Hundred Years' War.

Passing over many intervening outbreaks, the uncertainties of which yet remain to be dispelled, we may recur to the situation in 1762, when Spain and France, assembling their forces on Spanish territory, demanded that Portugal join them in their war with Great Britain. They justified their action by alleging, with some show of reason, that Portugal had not observed neutrality in the war. Portugal, acting in self-defense, declared war against them, and by so doing no doubt gained an advantage. In 1793, France declared war against Great Britain; but even English historians are by no means agreed that her action in so doing was not essentially defensive. The fact is well known that France in 1870 declared war against Prussia. The conflict was precipitated by the Hohenzollern candidacy for the Spanish throne and the supposed insult to the French Ambassador at Ems. France, upon the face of the record, was the aggressor. Twenty years later the world learned that the Hohenzollern candidacy was originally suggested to Spain by Bismarck, and also became acquainted with the circumstances attending the preparation of the version of the Ems incident which carried the French parliament off its feet.

On October 26, 1827, a combination of the naval forces of England, France, and Russia destroyed the Turkish fleet in the harbor of Navarino. The first actual shot appears to have been fired by the Turks, but English naval writers have candidly admitted that the Ottoman commander was not unjustified in be-

lieving that he was repelling an attack. Possibly he was; the allied fleet called it a "reconnaissance." Subsequently the Tsar declared war against the Sultan. France and England remained, as an English historian has remarked, "idle spectators." But the war had momentous consequences in the affairs of the Orient, and was inspired by rivalries which have not yet ceased to exist.

President Madison, in 1812, declared that Great Britain was at war with the United States while the United States was at peace with Great Britain, and called upon Congress to redress the balance. Congress promptly responded. Ten years later, Albert Gallatin, who had been Madison's Secretary of the Treasury, discovered in the French archives documents which led him to avow the belief that, if the truth had been known, the United States would never have entered upon the course that resulted in the war. President Polk, in May, 1846, declared that war existed by the act of Mexico, and Congress accepted his declaration; but there has always been a profound difference of opinion in the United States upon the question whether this view was justified. This difference is due to the fact that the title to the territory where the first armed collision took place was in dispute. If the territory belonged to Mexico, its occupation by the United States forces was an act of invasion; if the territory belonged to Texas, the Mexican attack upon those forces was an act of aggression. The insertion in the treaty of 1848, by which the war was ended, of a stipulation to the effect that, if differences should in future arise, neither republic should resort to "reprisals, aggression, or hostility of any kind" against the other, without having maturely considered whether the difference should not be arbitrated, has not prevented the recurrence of incidents whose merits are by no means clear.

The outbreak of war between China and Japan in 1894 presents striking analogies to that between the United States and Mexico in 1846. The answer to the question whether certain initial acts, such as the sinking of the *Kowshing*, had an aggressively hostile character, depends upon the solution of disputed claims as to what was at the time the status of Korea.

The examples that have been cited suffice to demonstrate how extravagant and groundless is the assumption that nations in general could be expected to hold together in attacking a particular nation, on the mere allegation from some quarter that it had "begun" hostilities. They further serve to show that, in many instances, the only proper course would be to seek to compel both parties to suspend hostilities. In private law, we should hardly undertake to justify a policeman who made it a rule, when a fight occurred, to side with the party whom he believed

to be in the right and help him kill his adversary. Such an innovation in domestic jurisprudence would be truly startling. It can hardly work satisfactorily in the international sphere.

The Limitation of Armaments. The question of the limitation of armaments, in all its vast and complicated ramifications, I will not now undertake extensively to examine. Although the Peace Conference of 1899 was originally convoked by the Tsar solely for its consideration, yet it was almost the only subject related to war which the Conference sedulously avoided. As some nations suddenly grow shy when the "freedom of the seas" is mentioned, so others suddenly balk when the regulation of activities on land is proposed. Nevertheless, it will not do to say that the subject lies wholly outside the realm of practical statesmanship. The mutual prohibition, for more than a hundred years, of naval armaments on the Great Lakes proves the contrary, and, together with the unfortified state of the land frontier, bears eloquent testimony to the tranquillizing influence of abstention from menace. Perhaps it may be said that the fundamental principle in such arrangements is that of mutuality. The mere absence of armaments will not ensure peace, nor will their mere existence provoke war. On the other hand, rivalry in armaments necessarily excites apprehension, apprehension begets fear, and fear breeds hatred. In the relative adjustment of forces with a view to a fair equilibrium, many and diverse elements must be taken into account. The question cannot be solved in a day or by one stroke, nor can the creation of new "balances" of power be regarded as a step toward its solution.

Difficulty of the Problems. In the formulation of plans for the preservation of peace, all the complicated elements with which the present survey has dealt must be taken into account. They can no more be neglected in the external than in the internal affairs of states. Mere alliance will not suffice. There must be organization of such character and extent as to gratify the desires, reconcile the ambitions, and settle the specific disputes of peoples, so that their attitude toward international order and internal order may be substantially the same.

Hence it is that while, for the preservation of peace, all devices such as international conferences, arbitration, mediation, and good offices are or may be useful, according to the circumstances of the case, back of all this we must, in the last analysis, rely upon the cultivation of a mental attitude which will lead men to think first of amicable processes rather than of war, when differences arise. To this end it will be necessary to rid the mind of exaggerated but old and widely prevalent notions as to the functions and mission of the state, of supersti-

tions as to "trial by battle," of the conceptions that underlie the law of conquest, and of the delusion that one's own motives are always higher, purer, and more disinterested than those of other persons, to say nothing of the passion for uniformity that denies the right to be different.

BOOK REVIEWS

EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES AND ITS DEPENDENCIES TO 1648. *Edited by* FRANCES GARDINER DAVENPORT. Washington, Carnegie Institution of Washington, 1917. Pp. vi, 387. \$2.50.

This volume is a contribution to the fundamental need of those who undertake to discuss historical questions, namely, trustworthy original material. The concoction of spurious documents for purposes of public deception is an industry of which no age has enjoyed a monopoly; and, after such a document has once found its way into circulation, ignorance, carelessness, and partizanship may be expected to assure it a relative immortality. Occasionally, however, perhaps after the lapse of a long time, there comes a painstaking, conscientious investigator, whose regard for the truth outweighs the desire for notoriety and the impulse to make "copy," and raises the question of evidential value. The results of his work will not be found on popular reading shelves, where they conceivably might tend to discredit current guides; and popular writers may regard his labors with a contempt not unmingled with apprehension. But they will be received with gratitude by sincere and honest students, in whom they inspire a feeling of confidence.

In this select category the present volume is to be included. On every page we see the evidence of painstaking, conscientious research. No trouble has been spared to trace and verify texts; and the result is a collection of materials on whose authenticity the student may rely.

These materials, as the editor's introduction explains, embrace fundamental documents relating to the great struggle which, from the middle of the fifteenth century onwards, took place between the maritime powers of Europe over the division of trade and dominion in the newly discovered lands in the western hemisphere. The first document is the papal bull of January 8, 1455, granting to Portugal exclusive rights as to trade and territory in the region south of Cape Bojador; the last is a collection of extracts from the celebrated treaty between Spain and the Netherlands, concluded at Münster,

January 30, 1648—a crucial document to which more than one important international controversy during the past quarter of a century has run back. A few of the documents are now printed for the first time. Of the texts in other languages than English and French, translations, made chiefly by the editor, are given.

In connection with what is said in the editor's notes concerning the effects of the temporary union between Portugal and Spain, from 1580 to 1640, I venture to refer, for a statement of territorial gains in the Brazils in the interior of the continent, which may be set off against certain losses elsewhere by Portugal, to the *Statement* of the late Baron Rio-Branco, as agent of Brazil, in the arbitration by the President of the United States of the Misiones question. (*Statement*, I, 19-20.)

Reprinted from *The American Historical Review*, XXIV (1919), 280-281.

WHAT IS "NATIONAL HONOR"? THE CHALLENGE OF THE RECONSTRUCTION. By LEO PERLA, with a special Introduction by NORMAN ANGELL. New York, The Macmillan Company, 1918. Pp. xxix, 211.

The author of the present work, finding that all previous devices to prevent war have failed, proposes to substitute for the troublesome conception of "national honor" the higher ideal of "international honor," and by "emotional appeals" and appropriate "advertising" to create the "international heart" upon which, as he declares, "international honor will rest as upon the rock of Gibraltar." To this end he would employ the "drama and moving pictures," and enlist the services, perhaps not so much of professional advertising men, whom apparently he has not as yet consulted, as of historians, teachers in the public schools and other creators of emotion by more delicate and more refined methods. His thought appears to be that, as force plays so large a part in the affairs of the world, the new movement must harness to its car that great incentive to interest and activity which the expectation of a fight, whether between human beings or inferior animals, invariably stimulates.

The author, considering the time to be "ripe for the shaping of this yet nebulous idea into a comprehensive policy," unhesitatingly affirms that "without question this task seems to belong first to America"; indeed, he declares that, "as a matter of fact, she has already embarked on this mission." Accepting

his word on this point as sufficient, we may still be justified in examining some of the assumptions of fact or of experience which he ventures to make.

The author advances the proposition that the moment a class "ideal," such as "honor," is embraced "by a more comprehensive group," the "particular class honor disappears." In proof, he tells us (p. 194) that "when the separate states of America federated into the American Union, the class 'states' ceased to be a moral absolute, and consequently the code of honor that characterized states as distinct moral entities became an anachronism." The reader, somewhat startled, would reserve judgment, had not the author, only a few pages away (p. 190), already asserted that

by creating a sentiment of international honor in a world federation, national honor would gradually disappear, just as aggressive state honor ceased to exist when the United States was confederated, even though state loyalties had been passionately strong, and interstate hatreds and antagonisms equally violent.

And yet, can the author be unacquainted with the fact that, seventy years after the Union was formed, "state honor" remained sufficiently aggressive to sustain one of the greatest of all civil wars?

Again, the author, in deprecating the defects of past arrangements, repeatedly affirms (pp. 4, 5, 27, 30, 108, 151) that the Hague Convention for the pacific settlement of international disputes "decided to arbitrate everything" "except matters of honor and vital interests." In reality, while the convention did not make arbitration compulsory, it excepted nothing from the scope of the process. On the contrary, it declared (Article 39) that arbitration might "embrace any dispute or only disputes of a certain category." The author, evidently never having read the treaty, confuses the arbitral provisions with those for the constitution of international courts of inquiry. He cites Holls; but, if he had carefully read that writer, he would find that the exception of "national honor and vital interests" was considered specially important in connection with courts of inquiry, lest they might pry into disagreeable facts which it would be a point of "honor" to suppress or conceal.

The author, accepting the assertions of writers who were trying to produce a particular emotion, speaks of the so-called "Bryan treaties" as "all-inclusive arbitration treaties." Had he examined their text he would have found that, far from providing for arbitration, they expressly declare that, after the commission of investigation shall have made its report, the parties shall reserve full liberty of action. We are told

(p. 51) that "the British authorities in 1841 permitted the *Creole* to go free though it carried a slave cargo." As authority the author quotes a passage which shows the contrary, the quoted passage correctly stating that the British authorities "permitted the slave cargo" of the ship "to go free." In other words, the slaves were liberated.

The author devotes fifty pages to quotations illustrating various phases of the conception of "national honor." He finds nothing definite or consistent in them. In this conclusion he is fully justified. To attempt to define "national honor" is a mere waste of words. It is purely a fighting term, signifying that the government, no matter what may be its object, prefers to take the chances of war. When, in the celebrated case of the *Alabama* claims, the British Government declined, in the first instance, a proposal for an amicable settlement, it justified its attitude by declaring that the question at issue involved its "honor." Seven years later, having concluded that it would be better to settle than to fight, it agreed to arbitration. The case of the *Creole* underwent a similar transformation, being eventually ended by arbitration. The fact is notorious that in some countries men resort to the courts in cases which in other countries are "settled" only by duels or street fights; and the difference is due to the cultivation in the former of moral and social conceptions which subordinate emotionalism and hysteria to the operation of rational processes.

The author speaks of the "clarity" with which the Monroe Doctrine is expressed, and intimates that "many wars have been averted" through its "clear and definite articulation." This view, which has the merit of novelty, would not have been accepted by the eminent diplomatist who declared that the Monroe Doctrine was a "facile potentiality," nor indeed by that President of the United States lately deceased who, in a post-prandial speech, said that it meant "keep off the grass." Such interpretations have been and still are very prevalent. They are not scientifically precise; they are indeed vague and expansive; but they are intended to be highly and actively suggestive. Probably those who have employed them have for that reason ascribed to them a deterrent effect.

Reprinted from the *Political Science Quarterly*, XXXIV, No. 1 (1919), 163-165.

CHINA AND THE WORLD-WAR. *By* W. REGINALD WHEELER. New York, The Macmillan Company, 1919. Pp. ix, 263.

The author of this work is a member of the faculty of Hangchow College. The direct contact which he has thus had with China has stimulated his interest in her fate and in the future of her people. He writes in a spirit of fairness and sincerity, not as a partisan but as one who seeks a just solution of a complex problem in the interest of all concerned. Like many others, he hoped that the regenerative effects of the war would be apparent throughout the world; and, believing that "the standards and ideals formulated by the free peoples" contained the solution and the "only solution" of the momentous situation in the Far East, he particularly hoped that they would be applied in that quarter.

What those "standards and ideals" were, he conceived to be both felicitously and authoritatively set forth and defined by President Wilson in the "Fourteen Points." Already China had, he tells us, been profoundly impressed by the declaration that "the world must be made safe for Democracy." In the "Fourteen Points" she hailed the detailed specification of that approaching consummation. This feeling indeed was not universal. There were doubters, skeptics, like Kang Yu-wei, who, although known at home as a reformer, ventured to declare: "There is no such thing as an army of righteousness which will come to the assistance of weak nations."

But the course of China was not to be determined by misgivings. President Wilson, says the author, had declared: "These issues must be settled—by no arrangement or compromise or adjustment of interests, but definitely and once for all and with a full and unequivocal acceptance of the principle that the interest of the weakest is as sacred as the interest of the strongest." China could ask nothing more. Confiding in the "standards and ideals" thus formulated, China declared war against Germany and Austria on August 14, 1917, as unconscious as was Mr. Wheeler, when he wrote his book, of the existence of the secret agreements of Great Britain, France and Italy with Japan for the disposal of Shantung. As Mr. Wheeler's volume was published in January, 1919, it furnishes us, beyond the disclosure of his expectations of a different result, no clue to his opinion of what was later done at Versailles.

Mr. Wheeler's text is supplemented with valuable appendices, containing the "Black-Dragon" statement of Japanese

policy in China in 1914, the celebrated Twenty-one Demands in 1915, official statements relating to the Lansing-Ishii Agreement in 1917, a summary of treaties and agreements referring to the territorial integrity and sovereign rights of China and the policy of the "open door," and a summary of treaties and agreements relating to Korea. It may be observed that Mr. Wheeler quotes (pp. 165-167) a passage from the speech of Dr. Wellington Koo, Chinese Minister at Washington, at the Long Beach Conference on the Foreign Relations of the United States, May 31, 1917, on the question of China's relation to the world's future. No better statement of that question has ever been made, and Mr. Wheeler has done well to reproduce it. He has, indeed, made throughout a judicious and discriminating selection of materials, and has thus furnished to the reader in a comparatively small compass and with intelligent elucidation the basis of an informed judgment.

Reprinted from the *Political Science Quarterly*, XXXIV (1919), 663-664.

BULLETIN DE L'INSTITUT INTERMÉDIAIRE INTERNATIONAL. Publication trimestrielle. Nos. 1-2, Janvier-Avril, 1919. Harlem (Pays-Bas), H. D. TJEENK WILLINK ET FILS; LA HAYE (Pays-Bas), MARTINUS NIJHOFF.

The object of the *Institut Intermédiaire International*, the new foundation of which the present publication is the organ, is to furnish information concerning matters of international interest, not of a secret or private character, whether relating to the law of nations, to the application of law, national or international, or to economic and statistical questions or questions of commercial policy. Such information will be furnished free or, if the executive committee so directs, at cost. The *Institut* is to be conducted by an administrative council, under the supervision of a *Conseil Protecteur*, four-fifths of whose members must be Dutch subjects. For the present the president of the foundation is Dr. Loudon, Minister of Foreign Affairs, while the president of the *Conseil Protecteur* is Dr. van Karnebeek, Minister of State.

The word *intermédiaire* is intended to denote that the purpose of the foundation is to serve as a link between those who desire to increase their knowledge of the institutions and conditions of countries other than their own. A person in China wishes to learn some detail concerning Spain; a person in England wants information about Russia, or in Chile about Bel-

gium, or in Germany about Peru, and so on: the *Institut* offers itself as an intermediary.

The first place in the present bulletin is given to a collection of documents designed to show the "genesis of the peace." These documents embrace President Wilson's Fourteen Points of January 11, his four points of February 12 and his speech of September 27, 1918; the Vienna note of September 14, 1918; Mr. Balfour's London speech; the various armistices; and other papers, covering altogether pages 25-104 of the bulletin. In some instances the date given is that of the journal from which the text is taken and not that of the utterance itself, while the language also is perhaps that of the journal and not that of the speaker or writer. The rule on these points is not uniform. From the scientific point of view the original text should be given as far as possible. Probably stricter attention will be paid to this in future issues.

The next seventy-five pages are devoted to private international law or, as it is commonly called in English-speaking countries, the "conflict of laws." Then follow papers relating to double taxation (pp. 178-196), international contractual relations (pp. 200-232), Zionism (pp. 233-245) and the war (pp. 246-258). In conclusion there are answers to questions (pp. 259-272). The questions relate chiefly to points of law. Experience no doubt will lead to the conclusion, which many of the present responses would seem to foreshadow, that, so far as such inquiries seek to elicit opinions, the attempt to answer them is more difficult than it is useful.

The object of the new foundation is altogether praiseworthy, and its success will depend not only upon the intelligence and fidelity of those by whom its work is carried on but also upon their possession of adequate resources to enable them to obtain the materials which they need. The gathering of authentic documentary materials is not an easy matter, nor is it inexpensive. It requires organization and constant watchfulness. The mere republication, in collected form, of materials, documentary or otherwise, gleaned from newspapers and periodicals, while it might be useful as grist for journalists, would not meet the requirements of scientific inquirers.

Reprinted from the *Political Science Quarterly*, XXXIV (1919), 668-690.

THE PAN AMERICAN SOCIETY¹

I FULLY concur in the suggestion that the incoming officers of the Society should appoint a strong Committee on Finance in order actively to take up the question of assuring the future of the Society.

I believe that the Society has, during the past two years, made appreciable progress and attained a position beyond that which it ever held before. It must either go forward or fall behind; it cannot stand still. If it must now abandon any of the advance it has lately made, the influence on its prospects must be very depressing and detrimental. If, on the other hand, it has demonstrated a capacity for usefulness, if it has shown that it can really serve an important purpose in the American world, I cannot help thinking that we should now seriously take up the question of putting it on an assured and permanent footing.

I have always believed that if the Society had permanent and adequate headquarters, its home might be made the center of activities far more substantial and far more effective than any that the Pan American Union at Washington has been able to carry on. The Pan American Union has been hampered, I may even say fatally hampered, by the fact that it is governed by a board composed of the diplomatic representatives of the American countries. Such a board must in its nature be ineffective for administrative purposes. Besides, I believe that New York, as a great commercial and financial center, is a far better base of non-political and non-diplomatic operations than Washington.

I have reason to believe that the Pan American Society has come to fill a distant place in the minds of the peoples of Latin America. Reports of our activities have not only been borne to Latin American countries by persons who have been entertained by us, but have been widely disseminated there through publications of the Pan American Union, of the American Association for International Conciliation, and, during the past year, by *The Pan American Review*. Visitors coming to the United States from the other American countries, men prominent in politics as well as in business, on arriving here, constantly inquire about our Society and look to it for some consideration. In these circumstances, is it not a fact that the So-

1. Reprinted from *The Pan American Review*, Vol. I, Nos. 12, 13 (January, February, 1920).

ciety has a substantial value? If it has not, then it is not worth preserving. If it has, I believe that its value is capable of great increase and diversification. We have often spoken of what it might accomplish if it had a permanent and adequate home, which could be considered as the center of Pan American activities of a non-political character, in the United States. It seems to me that such a center would be of the utmost value to our business interests. Besides, I know that we could secure for it the active cooperation of bodies such as the American Association for International Conciliation, whose Latin American Division is now under the efficient management of Dr. Goldsmith. Such a center would be, among other things, a source of the most up-to-date information in regard to the Latin American countries, of the conditions prevailing and the developments taking place in them.

THE SECOND PAN AMERICAN FINANCIAL CONFERENCE¹

IT was said of a certain person, for many years a member of the House of Commons, that, although his voice was much heard in the House, it was heard, not when he was on his legs, but when he was cheering other speakers. Perhaps this may be the appropriate function of a presiding officer, on an occasion such as the present one; but, as a preliminary to the discharge of that function, I desire briefly to advert to the significance of this gathering.

A famous statesman, traveler and author, not an American, with a view to accentuate the difference existing between the Northern and Southern continents of the Western Hemisphere, once remarked that their great racial and linguistic groups had nothing in common but two names, the name American and the name Republican. Accepting the remark at its face value, I venture to exclaim, "What a glorious heritage!"

What's in a name? perversely asked a poet. I answer—in one sense, nothing; in another sense, everything. When a lover hears his sweetheart's name, does he recall the poet's flippant inquiry, or does he not rather think of the radiant object of his adoration? I am prepared to leave it to the present assemblage, without regard to age or sex, to decide whether the true re-

1. Address at the banquet to the Foreign Official Delegates to the Second Pan American Financial Conference at the Hotel Waldorf-Astoria, New York, January 27, 1920. Reprinted from *The Pan American Review*, I, Nos. 12, 13 (January and February, 1920), 12-13.

sponse is not to be found in the lines of another poet, who confessed :

"I intended an ode ; but Rose crossed the road
In her latest new bonnet.

I intended an ode, but it turned to a sonnet."

Detached from all objects or conceptions, in heaven or on earth, names indeed are empty things, but in this vacuous sense they do not exist. As we really know and use them, they are symbols; and as symbols they run the entire gamut of human perception, human thought and human feeling. Love is a name, but life is desolate without it. Honor is a name, but millions have died to defend it. Fame is a name, but we hazard everything to achieve it. Home is a name, but it denotes the most sacred associations of childhood, of manhood and of age. And yet, assembled in what we may call to-night the Hall of the Americas, if we were to speak one all-embracing name, uniting thoughts of love, of honor, fame and home, that one name would be America.

In this broad, pervasive sense, America is not a mere term of geography; nor is it so in fact. It is at once a token and an inspiration. Having alike emerged from a colonial condition, the independent countries of America have been drawn together by sympathies springing from a long and arduous struggle for national existence. This circumstance was naturally reflected not only in their international relations but also in the development of their political institutions. But, while the political aspect was formerly predominant, I am happy to say that there has been exhibited, especially in recent years, a growing tendency towards an increase of sympathy and of mutual intelligence in educational, social and economic spheres. Of this tendency the Pan American Financial Conferences furnish one of the latest and most striking manifestations.

Although the Scriptures tell us that man shall not live by bread alone, yet it is equally true that he cannot live without it. The struggle for existence permeates all nature, and properly considered, is a blessing, not a curse. Of all ideals, if it can be dignified by that exalted title, slothful ease is the least respectable. The noblest of all is labor—labor with the hands, labor with the mind, labor with all the faculties of intellect and of heart, in order that the earth's treasures may be brought forth and be made to contribute to the general convenience and advancement.

To the achievement of this great end, nations as well as individuals, while preserving the stimulus of generous rivalry, must co-operate in a spirit of mutual respect and helpfulness. Let co-operation then be the watchword of modern civilization,

as it should be, and, I trust, is the watchword of Pan Americanism.

We speak of Pan Americanism, but, in so doing, we do not imply an attitude of antagonism towards any other quarter of the globe. If America exists for the Americans, so also does it exist for the rest of the world. And if we contemplate American progress and prosperity in this broad and all-inclusive sense, we may be pardoned if, in our cherished dreams, we think of America as the land of the future.

Almost two centuries ago, a great English prelate and philosopher, contemplating the prospect of planting arts and learning in America, wrote these inspired lines:

“Westward the course of empire takes its way;

The four first acts already past,

A fifth shall close the drama with the day:

Time’s noblest offspring is the last.”

Between the cultivation of arts and learning, and the pursuit of commerce, industry and finance, there should be no opposition or inconsistency. All these things alike enter into and form part of the complex problems of modern life and progress. Let us, as Americans, consecrate ourselves to the solution of those problems, in an earnest spirit of Pan American co-operation, to the end that Berkeley’s sublime forecast may be acclaimed by men everywhere as a glorious reality.

EXECUTIVE RESPONSIBILITIES AND IRRESPONSIBILITIES¹

SOME time ago an acquaintance, wishing emphatically to dissent from certain hopeful views which I had ventured to express, declared that he could not see how I could be so much of an “optimist,” since he thought that the world had “gone to the devil.” I cheerfully replied that that was why I was an optimist—that the world always had gone to the devil, but nevertheless had survived.

Historians are very much disposed to take a serious view of their subject, and to assume that what we dignify with the name of “history” is the product of thought and reflection. Statesmen are dragged forth from their closets, as the great beings who have done the world’s thinking and guided the

1. Phi Beta Kappa address at Columbia University, June 1, 1920. Columbia Department of Public Information.

masses along lines of preconceived policy. In reality, a moving picture show, with statesmen as the chief performers—the crowd aiding, abetting and possibly betting and sympathetically inspiring as well as perspiring—comes nearer the truth. History is indeed to a great extent a reflex of the various states of nerves through which men have passed; and, when I speak of men, I by no means intend to overlook or to minimize the part which women have, from the days of Eve, on through the times of Helen of Troy and Joan of Arc, and down to our own era, played in creating general nervous conditions. No doubt men have in all ages been conscious of the profound influence of this factor in the world's affairs; but it has remained for the men of the present generation, instead of compelling women to peep through the fence or survey the field from distant elevations outside the enclosure, frankly and openly to admit them to the game of creating what learned philosophers call "group consciousness," although what they really mean is the condition of the group's nerves.

We are prone to lose sight of the fact that states or nations, or whatever we may call our political groups, are merely collections of human beings, who exhibit in their aggregate capacity the traits and tendencies which they manifest in their individual capacity. Take the individual man and his traits and tendencies, as manifested in his home, in his counting house, at the theater, on the golf course, in the subway, or possibly even at his church, and you will have an exemplification of the traits and tendencies which you will find in the life of his state or his nation. For instance, a human being thinks that he or she has a grievance, or perhaps is in danger. There may be no real cause for the supposition. The fact may be quite contrary, but this does not matter. The person supposedly aggrieved or endangered acts upon his situation as he conceives it to be. If his apprehensions are not soon relieved, he broods upon it. As he broods his feelings grow stronger, his nerves become disturbed, and his judgment becomes unbalanced. He is then ready for any adventure and ready to fight anybody whom he fancies to be his oppressor or his would-be wrong-doer. So it is with men and women in the aggregate. It is not the objective reality but the subjective conception by which they are governed. Such are the elements with which we are obliged to deal in all affairs, national and international, as well as personal and individual. They are thoroughly and purely human. They vary from hour to hour and defy confident forecast or control.

At the present moment the world is endeavoring to recover, and no doubt is gradually recovering, from one of those periods of distemper which have, since the dawn of recorded history,

tended more or less regularly to recur. One of the invariable concomitants of such a period is the belief that the nature of man has undergone a radical change and that in the future everything will be different from what it was in the past. To men in high position is entrusted the exalted task of ushering in that change; and in consequence they often flatter themselves with the thought that they are instruments chosen by Divine Providence for that purpose. Supposedly called to this high mission, they lay before the world their plans of regeneration, and they are astonished, grieved and perhaps even incensed, when they find that they are meeting with opposition. As a matter of fact, people do not want to be radically changed; and they could not be radically changed by any human power even if they wanted to be so. While the extent to which raiment may be conceived to be necessary may vary with climatic conditions and with the fashions, there is no power on earth that can relieve men and women of their dependence on daily bread, or exempt them from the operation of the elementary passions of love and of hate by which they have always been more or less guided and controlled. To adherents of the school of radical regeneration, whether occasional or periodic, these may be discouraging reflections; but to those who take a broader, more philosophic and less emotional view of life they bring a certain consolation and hopefulness. They signify that, while we are not justified in believing that progress is ever continuous, we nevertheless are justified, in times of disorder and depression, in looking forward to a better future. Moreover, they also tend to impress upon us, in our calmer moments, the importance of thought and reflection as an antidote to the impulse to accept the guidance of gesticulations.

With this exordium I may proceed to the specific discussion of the subject of the evening's address.

The tendency to nervous oscillation is nowhere more strongly exhibited than in matters of government. At the present moment political discussions tend to converge upon the relations of the Executive and the legislature. This is a question by no means peculiar either to the United States or to the present time. But, wherever the question exists, there has always been more or less of a tendency to discuss it on the basis of the supposed "rights" of one department of government as against the supposed "rights" of another department of government; and in this way we often lose sight of the merits of the controversy, and particularly of the human elements that enter into it. Upwards of thirty-five years ago, the accomplished student of politics who now holds the exalted position of President of the United States, published a volume on *Congressional Gov-*

ernment, in which, among other things, he said: "Congress looks upon advice offered to it by anybody but its own members as gratuitous impertinence." When this statement was written, the Congress of the United States must have stood at the pinnacle of its power. How have the mighty fallen! As the Congress elected in November 1918 has not yet passed into history, and we therefore may forbear to write its epitaph in terms either of peace or of war, we are certainly not justified in imputing to its immediate and attentive predecessor a like attitude towards advice from the outside. The contrast does, however, serve to show that the relations of different departments of government change from time to time without any changes in our constitutional arrangements.

But it is obvious that there is a deeper cause in the recent change of attitude of Congress towards outside advice than mere individual changes in the membership. This cause is again pointed out by the distinguished student of politics above mentioned, who, in the work already quoted, says: "A President's usefulness is measured, not by efficiency, but by calendar months. It is reckoned that if he be good at all he will be good for four years. A Prime Minister must keep himself in favor with the majority, a President need only keep alive."

The thing of capital importance thus pointed out is the fact that under our federal or national constitution the President is elected for four years, while the members of the House of Representatives are elected for only two years. In consequence, we have the frequently recurring predicament that the President spends half of his term with a House of Representatives and perhaps also with the Senate in opposition to him; and this situation is rendered all the more anomalous by reason of the fact that under the Constitution of the United States the President possesses and exercises the veto power. This anomalous condition is the result of the system of checks and balances which the Constitution was designed to establish and to perpetuate. But it would surprise the framers of the Constitution, if they could be recalled to earth, to be told that, while the President might veto legislation for which the people have apparently indicated a desire, the Congress by which the legislation passed was not to be considered as representing the people, but that the Chief Executive, acting also as the chief of a minority party, was still to be considered as the tribune of the people and the representative of the popular will.

I put this matter directly and pointedly because of the increasing prevalence during the past fifteen or twenty years of the notion that the President of the United States is to be considered as being in a special sense the tribune of the people and

the trustee of the popular will. Such a conception not only has no place in the framework of our Government, but is at variance with the logic of our political arrangements. The Chief Executive represents the popular will just so long as the people have not indicated at a general election that he no longer represents that will. It may be true that he continues to represent the editorial will of some particular and perhaps very important section of the country; but a cursory examination of American history will suffice to show that this editorial will may by no means reflect the will of the people even of the particular section.

I have already remarked upon the tendency in the United States to discuss the "rights" of the different departments of government rather than the merits of the questions concerning which they may differ. In the admirable work from which I have already quoted—a work in which executive responsibility to the legislature is distinctly advocated—there is the following passage:

An effective representative body, gifted with the power of rule, ought, it would seem, not only to speak the will of the nation, which Congress does, but also to lead to its conclusions, to utter the voice of its opinions, and to serve as its eyes in superintending all matters of government, which Congress does not do. . . . If the people could have, through Congress, daily knowledge of all the more important transactions of the governmental offices, an insight into all that now seems withheld and private, their confidence in the executive, now so often shaken, would, I think, be very soon established.

In order that such a condition of things may exist, it is evident that a certain harmony, if not of opinion, at any rate of action, must exist between the Executive and the legislature. "Every political constitution," said Lord John Russell, "in which different bodies share the supreme power is only enabled to exist by the forbearance of those among whom this power is distributed." Never was this more true than in the United States, where, especially under the national Constitution, none of the three departments of government can be said to be wholly independent of the rest. Take, for instance, the question of the recognition of new governments. This is a power that belongs primarily to the Executive. But, to say that, because it belongs primarily to the Executive it should be exercised without regard to the views or the attitude of the Congress, would be at variance with the position taken by one of the most vigorous of American Executives. Andrew Jackson, when discussing as President in 1836 the question of recognizing the independence of Texas, said:

It is to be presumed that on no future occasion will a dispute arise, as none has heretofore occurred, between the Executive and the legis-

lature in the exercise of the power of recognition. It will always be considered consistent with the spirit of the Constitution, and most safe, that it should be exercised, when probably leading to war, with a previous understanding with that body by whom war can alone be declared, and by whom all the provisions for sustaining its perils must be furnished.

The tendency recently manifested in the United States to exalt the executive or administrative branch of the government and to degrade and render powerless the legislative branch represents essentially an unreflecting impulse set in motion by adventitious causes, and not justified by general experience. The time is not so very remote when there was in Europe only one parliament. With this exception practically all power was then centered in the Executive, and in agencies created by and dependent upon it; and, although it may be true that absolute and hereditary rulers have usually been more or less attentive to popular feeling, yet we look back upon the time when parliaments or independent legislative bodies did not exist as a period of despotism. Legislatures independent of the Executive were introduced in order that the people might have not only a voice in the making of the laws, but a direct control over legislation. In the same spirit independent judicial tribunals were set up in order that justice might be administered independently of executive interference and control.

But it is now the fashion to speak of legislative bodies only with impatience. Many of us can recall the popular applause that greeted the speaker, not so very many years ago, of the national House of Representatives, when he declared that he "thanked God" the House was "no longer a deliberative body." In reality, the speaker in question was a maker of epigrams and a wit, and did not intend to go so far as his bare words might indicate. Yet, it no doubt is true that, because the proceedings of the legislative branch of the government are open, and because they involve prolonged discussions and debates, a popular impression comes to prevail that the legislature wastes time because it does discuss and debate. In a narrow sense there may be much waste of time by all parliamentary bodies, but the waste is by no means so large as is generally imagined. The benefits of discussion, which include the illumination of pending questions by the examination and comparison of divergent views, cannot be secured without expenditure of time. Moreover, the function of legislation is one that should not be performed without deliberation. It was Alexander Hamilton, one of the profoundest statesmen and political philosophers of all time, who said: "In the legislature promptitude of decision is oftener an evil than a benefit." It is preposterous to suppose

that laws can be formulated and enacted with the celerity with which they can ordinarily be executed.

On the other hand, nothing could be more unfounded than the assumption that our executive departments invariably move with intelligence, decision and celerity. Equally unfounded is the supposition that on an average the men holding administrative positions are superior to those holding legislative positions. Even though it may be a merited compliment to our civil service to assume that it is filled with men of large capacity and high efficiency, yet it is hardly just to make this assumption at the expense of the legislature.

Without discussing the quality or the capacity of the members of our State legislatures, who naturally vary according to the character and level of intelligence of the population they represent, I do not hesitate to affirm, on the strength of some personal knowledge, that the unfavorable comments frequently heard upon the character and capacity of our national Congress are not justified by the facts. I often think that, even if we should admit that the adverse comments were fully justified, we are probably better off with what we have than if we had a Congress made up of the most blatant critics of the representatives whom the people have actually chosen.

A question much agitated at the present time, involving to some extent the relations of the Executive and the legislature, is that of the establishment of a budget system. I may at once say that I am most heartily in favor of such a measure. But opinions may legitimately differ as to the extent to which it is desirable, in carrying out the budget plan, to lodge supreme power with the Executive and to reduce the legislature to a subordinate position. I am inclined to think that this question has been much confused by the use of catchwords. We hear a great deal about "responsibility," and about making the Executive "responsible" for the budget. Very often those who employ this nomenclature are thinking of other countries where a system of government prevails which we have not yet adopted. I refer to the system of "responsible" government as it exists today in the principal countries of Europe, where by "responsibility" they mean an Executive Government composed of members of the legislature, dependent upon the legislature, and subject to dismissal by an adverse vote of the legislature. We have nothing of the kind in the United States. To speak, therefore, of making the Executive in the United States exclusively "responsible" for the budget, means an enhancement of executive power at the expense of the power of the legislature. In the budget system recently adopted in Massachusetts the power is reserved to the legislature to increase as well as to decrease

items in the budget submitted by the Executive; while, in some other quarters, the power of the legislature is limited to the diminution or decrease of proposed items of expenditure. Such a limitation was strongly resisted in Massachusetts by certain members of the legislature; and I cannot help thinking that so far as their resistance was, as I believe it actually to have been, inspired by an interest in government rather than by a desire to perpetuate a power which the legislature already possessed, it was a most wholesome sign. No doubt the Executive must play a large part in the formulation of a budget, but there is no reason to assume that the governor of a state is necessarily wiser than the legislature. In many instances the budget would be submitted by a newly elected governor. It is conceivable that he might not at the moment be qualified to form an intelligent individual opinion on all the questions involved.

Recurring now to questions specially affecting our national government, I conceive that there are at least three of present capital importance; and these are (1) the Presidency, (2) the relations of the Executive and the Legislature, and (3) the treaty-making power. I will consider them in order.

1. I have already intimated that, if the framers of our national Constitution could be resurrected, they would be dazed at the results of some of their handiwork. By nothing would they be more astonished than by the changes that have taken place in the filling and the activities of the chief executive office. When they provided for the election of one third of the Senate and of the entire House of Representatives every two years, but gave the Chief Executive a term of four years, the last thing they dreamed of was that the President would regard himself or would be regarded as a party leader. On the contrary, by the mode of election which they prescribed they designed to place him above and beyond the reach of mere party attachments. To this end they provided that he should be chosen, not by the people, but by a select body of men, called electors, chosen by the people of the several States "for the special purpose, at the particular juncture." The reasons for this device, as expounded by Alexander Hamilton² were (1) that the immediate election would be made "by men most capable of analyzing the qualities adapted to the station"; (2) that the electors would act "under circumstances favorable to deliberation"; (3) that a "small number" selected from the "general mass" would be "most likely to possess the information and discernment requisite to such complicated investigations," and (4) that the choice of several persons, to form an intermediate body of electors, would be less apt to afford oppor-

2. Lodge, *The Federalist*, p. 424.

tunity for the much dreaded evil of "tumult and disorder" than the direct choice of one man who was himself to hold the office. By this detached mode of selection it was expected that the operation of political, if not of ordinary human, passions would be avoided.

The design of the founders has been completely frustrated. Of the conception of a remote and non-partisan Chief Executive the most that can be said is that it barely survived the administration of Washington. Next, the so-called electors ceased to exercise their constitutional function, and became mere dummies to the candidates nominated by national conventions. And lastly, with ever-increasing momentum and louder avowal, the President has come to act as the head of his party.

When this point is reached, it is obvious that, without regard to the question whether we are to have "responsible government" in the English and general European sense, the original constitutional plan is completely shattered. The spectacle of the avowed head of a minority party for full half his term making appointments to the highest offices of state, vetoing measures passed by the actual representatives of the people, and incidentally conducting the entire foreign relations of the country, is an anomaly in politics furnished chiefly if not exclusively by the United States.

From such a predicament the way of escape is obvious. We need not import the device of an Executive dependent upon and subject to dismissal by the legislature. We can provide for the direct election of the President by the people every two years on the same day as the Congressional election. The biennial election of the President directly by the people was in fact strongly advocated in the constitutional convention by one of its ablest and most conservative members, Gouverneur Morris, of New York. Another and most strenuous advocate of the measure was James Wilson, a statesman of varied experience and of vast intelligence, of whom James Bryce has truly said that his speeches in the convention "display an amplitude and profundity of view in matters of constitutional theory which place him in the front rank of political thinkers of his age." But Morris and Wilson, and their followers, were eventually obliged to yield to the nervous compromise which died long enough ago to deserve decent and formal interment at the hands of the present generation. And perhaps I may be excused for suggesting that we might invest the interment with something akin to the cheerfulness of a wake, if we were to bury with the original constitutional plan the excrescence known as the direct presidential primary. Scarcely a decade has elapsed since we were required, on pain of being denounced as reac-

tionaries and partisans of corrupt politics, to lift up our eyes and nod obeisance to that latest and most beautiful flower of political reform. Doubting, we nodded; and ever since we have seen the fatal exotic rend parties, embitter their leaders, disrupt conventions, and produce other unintended results. And now to our dismay it has entered upon a career that promises, if unchecked, to add unconscionably to the high cost of political living. Perhaps we can find a substitute for it.

2. The second question to be considered is that of the admission to the Senate and to the House of Representatives of members of the Executive Government for the purpose of discussing measures of policy and of legislation. Such a step I conceive to be highly desirable; and I would by all means have the President himself subject to interrogation if he appears in person to address the Congress or either house of it. This would, in the first place, be desirable in order that there might be a greater co-operation between the Executive and the Legislative Departments of the Government. It would be perhaps even more desirable in order that it might enable the public to become better acquainted with what the Government is doing. In spite of all that is said on the subject of publicity, it is my opinion that the tendency of government in the United States, during the past twenty years, has been decidedly toward greater secrecy rather than toward greater publicity. When I speak of publicity I do not refer to the handing out to the press from time to time of such documents as an Executive Department may desire for its own purposes to make public. On the contrary, what I have in mind is the communication to the Congress of the United States, either voluntarily or in response to its requests, of such full and comprehensive information as will enable it to discharge its part in the functions of government. A somewhat exceptional and intimate acquaintance with our official records in the past enables me to say that, until a comparatively recent day, our government has had few secrets. The policy of open dealing was indeed practised at times when international exigencies might from a certain point of view be supposed to justify secrecy. Take, for instance, the publication, formerly made in each year, of the diplomatic correspondence of the United States. This series began in 1861, on the outbreak of the Civil War, and during that great conflict, which involved international relations of the most delicate character, the publication expanded to as many as four volumes in a single year. This was not deemed to be incompatible with the interests of the United States. Possibly it may be said that our relations with foreign powers were then less general and less intimate than they are today; but, if this argument be sound, its obvious

meaning is that in proportion as our international relations become more general and more intimate, they will also become more secret. But, as all governments now profess to desire publicity, in foreign as well as in domestic affairs, we must reject any such suggestion as altogether inadmissible.

3. Lastly, we may consider the question of treaty-making. There has been observable, especially in recent years, a tendency to criticize the Senate for exercising its express constitutional prerogatives in regard to the approval or disapproval of treaties. It is, however, my belief that this tendency does not represent a general public sentiment. In the first place, I am not acquainted with any occasion on which Senators, either collectively or individually, have been visited with the displeasure of their constituents because of their insistence upon the full exercise of the powers which the Constitution of the United States has conferred upon the body of which they are members. In the second place, I deem it to be inconceivable that there should exist in the United States any general sentiment in favor of committing to the Executive Department of the Government the entire and absolute control of the function of treaty-making.

It is not going too far to say that the existence in the United States of a widespread sentiment in favor of committing exclusively to the Executive the power to make treaties would justify a feeling of profound apprehension and alarm. To begin with, we must bear in mind that, under the Constitution of the United States, the making of a treaty embraces not only the exercise of the power to negotiate but also of the power to legislate. Alexander Hamilton, in one of his papers in *The Federalist*,³ declared that, if the operation of the power to make treaties were carefully considered, it would "be found to partake more of the legislative than of the executive character," though it did not seem "strictly to fall within the definition of either of them"; and he further declared that "it would be utterly unsafe and improper to intrust that power to an elective magistrate of four years' duration."

Under the governmental systems still existing in some countries, we may find, as a remnant of the days of absolute power, when independent legislatures did not exist, that the making of treaties belongs at least nominally to the executive head of the government; but we shall probably also find that under such systems treaties are regarded merely as executive acts, which the courts do not enforce until they have been incorporated in or sanctioned by legislation. But, under the Constitution of the United States, a treaty is a supreme law of the land, binding

3. (Lodge ed.), pp. 466, 467.

upon all the courts of the country, national and State, and overriding not only all inconsistent national laws but all inconsistent State Constitutions as well as State laws. The proposal, therefore, to endow the Executive of the United States with entire and absolute power to make treaties would be to make the Executive in that vital and hazardous sphere, supreme in legislation as well as in administration.

If any desire to do this exists in the United States, I can only say that it is wholly out of accord with democratic tendencies as understood everywhere else in the world. Take the recent peace treaty with Germany. In every country in which it has been put into force it has been submitted to and has received the sanction of the legislature. The fact that the treaty, as signed by the executive representatives of the United States, has not received the approval of the Senate of the United States, is obviously to be ascribed to the fact that, under the governmental systems existing in the countries in which the treaty has been ratified and put into effect, the national constitution assured harmony of action between the Executive and the legislature, and that in general this harmony was assured by the direct responsibility of the Executive to the legislature. Indeed in one of those countries, that is to say in Great Britain, the representatives of the Government before going to Paris obtained a fresh mandate from the people. The Constitution of the United States does not provide a direct method of obtaining such a mandate, although it does provide for the holding of elections for other purposes.

Regarding it as inconceivable that the people of the United States, in case they should wish to change their present arrangements in regard to treaty-making, would desire to invest absolute power in that regard in the Executive Government, I shall assume that the only question at present to be considered is whether the power to ratify treaties should be transferred from the Senate, with the present requirement of a two-thirds' vote, to the Congress of the United States as a whole, voting by a majority. As regards various kinds of treaties, I have long thought that such a change would be logical and desirable. This is particularly the case in respect to treaties affecting commerce and finance. Beginning with the McKinley Act of 1890, the Congress of the United States has on successive occasions given authority to the Executive to make reciprocity agreements within certain limits. But all previous steps in that direction were outdone by the so-called Underwood Tariff Act, which became a law, with the President's approval, on October 3, 1913. By this statute the President, with a view to readjust duties on imports and to encourage the export trade, was, as

the text reads, "authorized and empowered to negotiate trade agreements with foreign nations," this professed bestowal of authority and power being coupled with the express proviso that such agreements, "before becoming operative, shall be submitted to the Congress of the United States for ratification or rejection."⁴

This section of the Act of October 3, 1913, may be taken as a starting point in the consideration of modifications of the present method of treaty-making in the United States.

MANUEL GONDRA, PRESIDENT-ELECT OF PARAGUAY¹

THOSE of us whose memories run back to a period more or less remote can hardly fail to recall how we thought of the countries of South America as lands far distant and somewhat inaccessible. Thirty years ago there was taken up at the first of the International American Conferences the project of a Pan American railway: but, although this project was then first espoused in a practical way, the conception of it did not originate with the Conference. Some years before, a traveler from the United States to Brazil, during a three weeks' futile and nauseous rocking in a sailing vessel in the cradle of the Doldrums, conceived the idea of what he called the "Three-Americas Railway," and incorporated it in a book. While distance and delay did not lend enchantment to his view, they stimulated him to dream of a time when communication between the continents of North and South America would not be dependent upon deep-laden argosies which the winds refused to propel.

Among the southern countries of which we were accustomed to think as distant and more or less inaccessible was a country in the interior of South America, called Paraguay.

Under conditions existing a century ago, such a country seemed to be destined by nature to a life of seclusion; and for many years Paraguay was accordingly thought of as a secluded country. Surrounded by powerful neighbors, who controlled her access to the outer world, she pursued a policy predominantly individualistic, zealously safeguarding and maintaining

4. 38 Statutes, 114, 192.

1. Address at the dinner in honor of Manuel Gondra, President-elect of Paraguay, at the Hotel Waldorf-Astoria, New York, July 15, 1920. Reprinted from *The Pan American Review*, I, No. 18 (July, 1920), 12-13.

her independence. But, in this and in other things, time has wrought its inevitable changes. Year by year, and we may almost say day by day, Paraguay has become nearer to us and we have become nearer to her. We think and speak of her as a sister Republic, fulfilling the obligations and achieving the destiny incident to that character and condition. Her communications and relations with the rest of the world are not only continuous and effective in the physical and commercial sense, but they are also steadily progressing in the political and social sense.

It was only to be expected that important industrial enterprises should find in Paraguay a field of development. Her trade has shown in the past few years a remarkable increase, but it may truthfully be said that we have witnessed only the beginnings of its development. Paraguay, by reason of her resources, is entitled to a great commercial and industrial future; and her Government has frequently manifested a disposition to co-operate in making that future secure. An examination of the work of the Pan American Financial Conferences and of their permanent agency, the Inter-American High Commission, will show that Paraguay has been among the first of the American Governments to ratify and put into effect the measures recommended by those organizations.

Experience teaches that, with the increase of commerce and industry, there arise problems affecting the daily life of the people, their privileges and pastimes. We are very familiar with such problems in the United States, and Paraguay is not a stranger to them. In a pamphlet that has recently come to my notice, entitled *Asuncion, Paraguay's Interesting Capital*, I find the statement that, while public amusements are not so numerous there as in larger cities, yet, Paraguay "has a liberal number of legal holidays during which all classes enjoy relaxation from the usual prosaic routine." Bearing in mind the "holiday" tendencies lately exhibited in the United States I recall, on reading that statement, a remark once made by a person who accused another of being a teetotaler, and who, when asked if there is anything wrong in belonging to that category, replied, "Well, no; if you don't teetotal too much."

Turning my thoughts in a different direction, I may say that the Pan American Society of the United States, although not a promotional organization in a commercial sense, but only in a social and hospitable sense, firmly believes in the principle of promotion. The Society is, therefore, both fortunate and happy in having found within a year two notable occasions on which to celebrate the application of that principle. A year ago this month the Society had the honor to entertain the President-

elect of Brazil who, after discharging high diplomatic functions at the peace conference at Paris, was then on his way to his inauguration; tonight, the Society has the honor to pay its respects to the President-elect of Paraguay, who, after a distinguished diplomatic career in the United States, is returning to his own land in order to assume the duties of the great office to which he has been chosen.

Great rulers have in all ages been called upon to perform two exceedingly important functions. One of these functions is to tell the people of other countries what to do, and, if possible, compel them to do it. This we call the principle of national self-determination. The other function is to tell their own people what to do, and then, if possible, proceed straightway to do it. This we call the principle of popular self-government.

Knowing, as I do, the career and the accomplishments, the wisdom and the intelligence, of our guest of honor, I am free to say that the people of Paraguay could not have found among their distinguished citizens one more competent to discharge those great functions, no matter how indisposed he may be to stretch the limits of power.

Mr. Gondra is known throughout the American continents for his character, his abilities, and his attainments. He is an American, and a great American. Paraguay is fortunate in having selected him as her chief executive magistrate. We wish him the highest success and prosperity in that exalted station.

I ask you to rise to the toast. "Señor Don Manuel Gondra, Envoy Extraordinary and Minister Plenipotentiary to the United States, and President-elect of Paraguay."

THE PAN AMERICAN FINANCIAL CONFERENCES AND THE INTER-AMERICAN HIGH COMMISSION¹

ON March 12, 1915, while the Great War, daily increasing in intensity, was drawing the world more and more into its vortex, the American Governments were, in the name of the President of the United States, invited to send delegates to a conference with the Secretary of the Treasury, at Washington, with a view to establish "closer and more satisfactory financial relations between the American Repub-

1. Reprinted from *The American Journal of International Law*, Vol. XIV, No. 3 (July, 1920).

lies." To this end it was intimated that the conference would discuss not only problems of banking, but also problems of transportation and of commerce. It thus came about that there assembled in Washington on Monday, May 24, 1915, under the chairmanship of the Honorable William G. McAdoo, Secretary of the Treasury, the first Pan-American Financial Conference.

The subjects submitted to the conference embraced public finance, the monetary situation, the existing banking system, the financing of public improvements and of private enterprises, the extension of inter-American markets, the merchant marine and improved facilities of transportation. It was a program that went beyond the emergencies growing out of the war; and the conference in its deliberations did not confine itself to the adoption of temporary devices. On the contrary, it sought to meet a permanent need by establishing an organization which should devote itself to the carrying out of a task whose importance was not to be measured by temporary conditions, whether of war or of peace.

The formulation of the program of future work was entrusted to the Committee on Uniformity of Laws relating to Trade and Commerce and the Adjustment of International Commercial Disputes. The report of this committee, while reserving for separate and distinct treatment the difficult and complex problems of transportation, recommended that the following subjects should be specially pressed:

1. The establishment of a gold standard of value.
2. Bills of exchange, commercial paper, and bills of lading.
3. Uniform (a) classification of merchandise, (b) customs regulations, (c) consular certificates and invoices, (d) port charges.
4. Uniform regulations for commercial travelers.
5. Measures for the protection of trade-marks, patents, and copyrights.
6. The establishment of a uniform low rate of postage and of charges for money-orders and parcels-post between the American countries.
7. The extension of the process of arbitration for the adjustment of commercial disputes.

For the purpose of dealing with these subjects, and particularly for bringing about uniformity of laws concerning them, the committee recommended that the independent American countries establish an Inter-American High Commission, to which each country should contribute a section. To this end each Minister of Finance, or, in the United States, the Secretary of the Treasury, was to appoint not more than nine persons, residents of the country, who, with himself as *ex officio*

chairman, should constitute the national section, the aggregate of these sections constituting the Commission. The advantages of this plan were obvious. As the national sections, composed of citizens of the respective countries, and headed each by a cabinet minister, were in immediate relations with their governments and could deal with them directly, the work of the international body could by this means be carried on continuously and in all the countries at once, without suspicion of intrusiveness or suggestion of impropriety, and also without the complications, perplexities and delays which circuitous methods and absorbing formalities tend to engender. The recommendations of the committee were unanimously adopted, and the Inter-American High Commission came into being.²

The conference further resolved that the local members of the Inter-American High Commission should be immediately appointed in their respective countries; that they should at once begin preparatory work; that the various governments should be requested through their appropriate departments to co-operate in the work of the Commission; and that the members of the United States Section should, as soon as practicable, proceed to visit the other American countries to meet the members of the Commission there resident. The establishment of the Inter-American High Commission was a measure of the greatest practical significance.

In 1889, there met at Washington the first of the assemblies known as the International American Conferences, of which four have so far taken place, and of which the fifth, but for the outbreak of the war in 1914, would long since have been held. Although the first of these conferences encountered criticism and even derision, it would be difficult, if not impossible, to find any one today who would either censure their spirit and purpose or deny their beneficent effects. The good results accomplished by them could hardly be overestimated. They undoubtedly blazed the way for the numerous other conferences, scientific, educational and economic, in whose proceedings the progress of Pan Americanism during the past three decades is recorded. But the International American Conferences had one capital defect: they lacked a permanent organization to carry on their work. Hence, after they adjourned, the excellent and far-reaching plans which they had incorporated in treaties, conventions and resolutions, often lapsed and remained unexecuted for want of a continuous and permanent body to follow

2. In fact, the title "International High Commission" was then used; but, as "Inter-American High Commission," which is more accurate, has since been substituted for it, I use the latter throughout this paper, so as to avoid the perpetuation of a discarded title.

them up and attend to their ratification, application and development. The want of such a body in our inter-American relations was supplied by the creation of the Inter-American High Commission, the United States Section of which was legislatively sanctioned by the Act of Congress of February 7, 1916.

In conformity with the resolutions of the first Pan American Financial Conference, the United States Section in due time proceeded to Buenos Aires, where, in April, 1916, the Inter-American High Commission held its first general meeting, under the presidency of the Hon. Francisco J. Oliver, Argentine Minister of Finance. All the national sections of the Commission were represented at this meeting, more than seventy of its members being in attendance. Nothing could more clearly attest the general interest felt in the work or the universal appreciation of its practical importance.

At Buenos Aires the Commission, besides dealing with the subjects designated by the first Pan American Financial Conference for special treatment, also included in its deliberations the question of international agreements on uniform labor legislation; uniformity of regulations governing the classification and analysis of petroleum and other mineral fuels with reference to national development policies; the necessity of better transportation facilities between the American Republics; banking facilities, the extension of credit, the financing of public and private enterprises, and the stabilization of international exchange; telegraphic facilities and rates, and the use of wireless telegraphy for commercial purposes; and uniformity of laws for the protection of merchant creditors.

At Buenos Aires the Inter-American High Commission also took an important step in the further development of an effective organization. This was done by the creation of a common organ or agency, called the Central Executive Council, consisting of a president, a vice-president, a secretary-general, and an assistant secretary-general; and as Washington was unanimously designated as the headquarters of the Commission till its next general meeting, the chairman, the vice-chairman, and the secretary of the United States Section thus became the Central Executive Council, with the responsibility of supervising, co-ordinating and carrying on the Commission's work.

The work has been steadily and energetically pressed. Valuable publications, intended to elucidate and support the measures which the Commission has in charge, have been prepared, printed, and circulated, and appreciable progress has been made in securing the adoption of those measures. In these activities the Central Executive Council has had the intelligent,

hearty and efficient co-operation of the several national sections, which have, in many instances, made admirable studies of the subjects under consideration.

Substantial ameliorations of methods of customs administration have been secured in various quarters. Regulations permitting sanitary visits outside regular hours, the simultaneous loading and unloading of cargoes, and the advance preparation of cargoes, have been brought about in numerous countries. Progress has been made with the adoption of a uniform statistical classification of merchandise, as recommended by the Inter-American High Commission at Buenos Aires. Six countries have already taken favorable action, and two more are understood to be on the point of so doing. Every effort has been made to advance uniform legislation in regard to bills of exchange, checks, bills of lading, and warehouse receipts, and appropriate documentary material has been prepared and circulated on those topics.

In dealing with the subject of bills of exchange, the Inter-American High Commission, taking into consideration the legal conceptions generally prevailing in the American countries other than the United States, and the opinions of their leading jurists, decided to recommend to those countries the adoption of The Hague Rules of 1912, with certain modifications. This decision has been justified by the results. Already The Hague Rules have been substantially incorporated in the codes of Brazil, Guatemala, Nicaragua, and in the new commercial code of Venezuela; and measures of like purport have been introduced in at least four other countries. We seem to be rapidly approaching the time when, so far as concerns bills of exchange, there will, in effect, be only two systems in use in the Western Hemisphere, based, respectively, on The Hague Rules of 1912 and the United States Negotiable Instruments Act of 1916.

A bill has been introduced in the Congress of Uruguay to incorporate into the Commercial Code the tentative Hague Rules of 1912 in regard to checks. The new Venezuelan Commercial Code of December 19, 1919, incorporated these rules. In the Congresses of Argentina and Nicaragua, measures have been introduced similar to the United States Bills of Lading Act. The Commission has also been glad to observe a growing interest in the adoption of uniform legislation on the subject of warehouse receipts, as well as on that of conditional sales. The Peruvian Congress has lately enacted a law on the former subject, substantially based on the Uniform Warehouse Receipts Act in the United States, and a similar step has been under discussion in Argentina, Paraguay, and Uruguay. In-

creased interest in conditional sales legislation has notably been shown in Argentina, Brazil and the United States.

During the war, constant efforts were made by the Inter-American High Commission, largely through the Central Executive Council, acting in co-operation with the various national sections, to relieve the burdens and inconveniences arising out of the conflict, as regards transportation and other matters. Of those efforts, no detail can now be given. It is necessary on the present occasion to limit the rehearsal of the Commission's activities chiefly to measures of a comprehensive and systematic nature, the development of which is still going on.

Among those measures one of the most important is that bringing into operation the convention adopted by the International American Conference at Buenos Aires, in 1910, for the protection of trade-marks. By this convention the American Republics were divided into two groups, the northern, embracing the United States, Costa Rica, Cuba, Dominican Republic, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, and Salvador; and the southern, embracing Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, Uruguay, and Venezuela. Of the southern group, Rio de Janeiro was designated as the official center, and of the northern, Havana; and at each of these capitals there was to be established an international bureau for the registration of trade-marks, so as to secure their international protection in the Americas. This treaty, so closely related to the interests of the countries concerned and not least to those of the United States, had lain dormant and unratified. The Inter-American High Commission took it up and brought about its ratification by the requisite two-thirds of the northern group, all of whose members, except Mexico and Salvador, have now ratified it. As a result, the International Bureau of Havana is now open and in operation. It is hoped that a similar result may soon be attained in the southern group, where Bolivia, Brazil, Ecuador, Paraguay, and Uruguay have so far deposited their ratifications. Meanwhile, it would seem to be worth while to consider whether, pending the establishment of the Rio bureau, an arrangement might not be made whereby the members of the southern group, which have ratified the convention, may gain the benefits of international registration by accepting the services of the bureau at Havana.

Another measure that has been vigorously pressed is the convention to facilitate the operations of commercial travelers. In a number of the American countries local taxes, practically prohibitive in amount, on the operations of such travelers, have for many years existed. The Inter-American High Commission,

at its meeting at Buenos Aires, adopted a resolution containing the basis of uniform regulations for commercial travelers and their samples. Taking this resolution as a starting-point, the Central Executive Council drafted an international convention, which, after examination and revision, was submitted by the Department of State to the American Governments, looking (1) to the substitution for all local taxes of a single national fee; and (2) to the admission of samples, (a) without value, free of duty, and (b) with value, under bond for payment of duty on any not afterward withdrawn. This convention, which was first signed and ratified by the United States and Uruguay, has since been signed and ratified by Guatemala and Panama, and has been signed by five other countries—Salvador, Venezuela, Paraguay, Ecuador, and Nicaragua—whose ratifications are awaited. It is understood that several others are ready to sign the convention, while yet others are still considering it, some apparently with favor.

Another measure preferentially dealt with, because of its significance for the future as well as for the present, is the treaty for the establishment of an international gold clearance fund. This treaty has a twofold object. It is designed not only to assure the safety of deposited gold and to avoid the necessity of its shipment when difficulties in transportation exist, but also to facilitate and stabilize exchange through the adoption of an international unit of account. The plan was very carefully studied by the Inter-American High Commission at Buenos Aires; and subsequently, through the co-operation of the Central Executive Council with the Department of State, at Washington, it was incorporated in a draft of a treaty. This draft has so far been signed with the United States by Paraguay, Guatemala, Panama, and Haiti, but it has been approved in principle by at least six other Republics, some of which are now actively considering its adoption.

In order that the nature and object of this treaty may be understood, I will give a precise outline of its provisions. It is agreed that all deposits of gold, made in a bank designated for the purpose, in any of the signatory countries, for the payment of debts incurred in another such country in private commercial and financial transactions, shall be treated as an international trust fund, to be used for the sole purpose of effecting exchange, where, for one reason or another, the actual shipment of gold is to be avoided. To attain this end, the treaty provides the following machinery: Each signatory government is to designate a bank within its jurisdiction to hold any part of the fund there existing as joint custodian with such person or persons or such institution or institutions as the signatory gov-

ernments may concur in appointing for the purpose. These joint custodians would hold the moneys so entrusted to them, as part of the fund, subject to the order of the creditor or creditors for whom the fund is held. Obviously, as the number of signatory governments increased, so would the number of joint custodians. While the international scope of the fund would thus be enlarged, the interest in its security and administration would be correspondingly widened.

The details of the practical operations of the fund are to be regulated and determined between the designated banks. In order to facilitate such operations the signatory governments agree to take into consideration the ultimate adoption of a uniform exchange standard, permitting the interchangeability of their gold coins; and for this purpose they recommend the adoption of gold coins which shall be either a multiple or a simple fraction of a unit consisting of 0.33437 gram of gold 0.900 fine. This unit, which represents twenty cents, or one-fifth of a dollar, United States gold, has been popularly called the American franc. Irrespective, however, of the contemplated ultimate unification of standards of American gold coins, the plan, reduced to its simplest meaning, involves the creation of international safe-deposit boxes, where gold may be kept under the guardianship of several American governments, signatories of the treaty. The International Gold Clearance Fund Treaty by its terms covers only the American nations; but it contains a principle, the discussion of which has lately attracted wide attention and which may prove to be of incalculable value to the world in the future.

Nor should we overlook what has been accomplished in extending the practical acceptance of the principle of the arbitration of commercial disputes. In the program of the Inter-American High Commission this subject has occupied a prominent and permanent place. A substantial achievement was recorded, when, on April 10, 1916, a plan, agreed upon by the Chambers of Commerce of the United States and Buenos Aires, was formally put into effect. The results have been most gratifying; and agreements have since been made between the United States Chamber of Commerce and the national Chambers of Commerce of Uruguay, Ecuador, Panama and Guatemala. Similar agreements are in process of negotiation with the Chambers of Commerce of Honduras, Peru and Montevideo, and one with that of Asunción has just been signed. Much yet remains to be done to give legal certainty, stability and efficiency to the system. Especially is this the case in the United States, where the archaic rule permitting the disregard of arbitral clauses still prevails. This rule should be superseded by

legislation, similar to that which exists in most other countries, making commercial arbitration, under the supervision of the courts, an integral part of legal procedure. On this question I feel that I can add nothing to the argument so comprehensively and cogently presented in the recent volume on *Commercial Arbitration and the Law*, by Mr. Julius Henry Cohen of the New York Bar.

The Central Executive Council has had in its work the active and hearty co-operation of various bodies, such as the American Bankers' Association, the Committee on Commercial Law of the Conference of Commissioners on Uniform State Laws, the United States Chamber of Commerce and the National Foreign Trade Council. It is gratifying to bear testimony to the aid and support thus rendered.

At the present hour, when we are accustomed to think in billions, unfortunately, I may say, of accumulated and accumulating debt rather than of accumulated and accumulating treasure, I trust that I shall not seem to sound a discordant note if I advert to the strict economy practiced by the Inter-American High Commission in its expenditures. So far as concerns the Treasury of the United States, the entire cost of the Commission, since it began its work in 1915, including the visit of the United States Section to Buenos Aires in 1916, represents an annual average hardly equal to the cost of two large public dinners; and when I speak of expenditures, I include not only salaries, but furniture and equipment, stationery and printing, the use of the telegraph and the telephone, and expert assistance in law and in languages. The smallness of the expenditure, which is out of all proportion to the work actually done, is to be ascribed not only to the voluntary services rendered by individuals and by public bodies, but also and in the main to the devotion of the permanent working force and the exceedingly moderate compensation which it receives.

The Second Pan American Financial Conference met in Washington on Monday, January 19, 1920. Its formal business sessions ended on Friday, January 23d. There were, however, on the official program certain additional exercises, the last of which was a dinner given to the foreign official delegates by the Pan American Society of the United States at the Waldorf-Astoria, in New York, on the evening of Tuesday, January 27th. More than five hundred persons were present at this banquet.

All the American Republics were officially represented in the Conference, except Costa Rica, which had no delegate because the United States has not as yet recognized its existing government. At the head of the delegations from Argentina, Colom-

bia, Haiti, Nicaragua, Paraguay, Peru, Salvador and Uruguay, were their Ministers of Finance. Guatemala's delegation was headed by her Minister of Foreign Affairs. A similar position in the delegations from Cuba, the Dominican Republic, Ecuador and Mexico, was occupied by their diplomatic representatives at Washington.

As in the first Conference, the work, with the exception of addresses, was performed by group committees and a committee on resolutions. The presiding officer was the Secretary of the Treasury of the United States, the heads of the various foreign delegations being vice-presidents. By a group committee is meant a committee assigned to a particular country. Each country had such a committee, consisting of its official delegates, usually three in number, and a group of citizens of the United States, usually to the number of fifteen or sixteen, and a secretary. The United States group, it may be observed, though an unofficial body, is designed to continue in existence, for consultative and other purposes.

The group committees were very active bodies, working incessantly and very earnestly, in order to prepare and to present to the Conference, within the brief space allowed, a comprehensive report on the financial, industrial and commercial situation in the respective countries, with recommendations as to what particular measures should be adopted to meet their various needs. All committee reports and all proposals were referred to the Committee on Resolutions, whose report was presented to the Conference on the morning of Friday, January 23d. With the adoption of this report, the formal sessions at Washington came to a close.

The report embraced eighteen resolutions, by the first of which, with a view more definitely to indicate its constituency and sphere of work, the title of what was previously called the International High Commission was changed to Inter-American High Commission. To this body the resolutions specifically referred, for study or for action, various matters concerning which it was not practicable for the Conference itself to make a definitive recommendation. These included railway transportation, uniformity of bills of lading, postal facilities and cable, telegraph and wireless communication; uniformity and relative equality in laws and regulations governing the organization and treatment of foreign corporations; uniformity of laws on the subject of checks; the question of the best method of avoiding the simultaneous double taxation of individuals and corporations as between American countries, and that of the creation of an Inter-American tribunal for the adjustment of questions of a commercial or financial nature involving two or

VOICES ACROSS THE CANAL¹

THE present occasion is the third on which the Pan American Society of the United States, has, since the middle of last year, had the high distinction of entertaining the President-elect of a sister Republic of this hemisphere. This interesting fact betokens in a most gratifying way not only the increasing intimacy, but also the increasing sociability of the intercourse between the American nations. Nothing so much contributes to good feeling as does the practice of hospitality. There is an old saying, in the folklore of more than one people, that men, after they have broken bread together, should not be enemies. The spirit of the banquet is fitly typified by the loving cup, whose fraternal import, I may venture to remark, is not measured by the stimulant quality of the contents; for experience teaches that the heating of the blood does not necessarily promote amiability. But, in the very act of gathering about the festive board, for the sustentation of life and the exchange of courtesies and of gracious thoughts, there is a happy blending of material and spiritual elements and an exemplification of human existence in its most pleasant phases.

The Pan American Society is profoundly sensible of the privilege it today enjoys in having as its guest of honor the President-elect of the Republic of Panama. The Society indeed regards itself on the present occasion as the favored instrumentality through which the oldest of the American Republics pays a tribute of respect and good-will to the youngest. Never could it have been said of this youthful but prosperous state that it was "to fortune and to fame unknown." In a special sense it was born to immortality, since it was foreordained to hold within its confines and thus to be forever identified with the greatest of all international highways, for centuries styled the "dream of the ages"—the Canal connecting the waters of the Atlantic with the vast expanse of the Pacific. Along this noble highway there now daily pass, not the small wind-propelled ships of earlier types, but the deep-draft, steam-driven leviathans of the greatest of all commercial and industrial ages.

1. Address delivered at the luncheon at the Bankers' Club (New York) in honor of Dr. Belisario Porras, President-elect of Panama, September 17, 1920. Reprinted from *The Pan American Review*, II, No. 2 (September, 1920), 10-11; American Association for International Conciliation, Inter-American Division, *Bulletin No. 23* (1920), pp. 3-6.

States, and that uniformity should be observed in the preparation of statistical works; and with the arbitration of commercial disputes, advising that the plan put into effect between the Bolsa de Comercio of Buenos Aires and the Chamber of Commerce of the United States in 1916 be extended to all the American countries, and that legislation be adopted, wherever it is now lacking, for the purpose of incorporating the arbitral settlement of commercial disputes into the judicial system, to be carried out under the supervision of the courts.

The Conference, recognizing the value of the services of commercial attachés, strongly urged a substantial extension of the system, and declared that, in so doing, it intended "to express its sense of the importance of appropriate training, linguistic and otherwise, for all branches of the foreign service, as a means of developing and facilitating commercial and financial relations."

The Conference recommended that the Webb Law, which to a certain extent permits combinations in the export trade, be so amended as to permit American companies, importing or dealing in raw materials produced abroad, to form, under proper governmental regulation, organizations to enable such companies to compete on terms of equality with companies of other countries associated for the conduct of such business. At the same time the Conference resolved that it was in the interest of all nations that there should be the widest possible distribution of raw materials, and that the importation of such materials into any country should not be prevented by prohibitive duties.

The foregoing summary of the resolutions of the Conference suffices to indicate the character and scope of its work. Looking to the future, it may be affirmed that work such as that in which the Pan American Financial Conferences and their permanent organ, the Inter-American High Commission, are engaged, is of incalculable importance. The American Republics cover a vast area with an aggregate population of almost 200,000,000. They represent all varieties of soil, of climate and of resources. Not in any sordid sense, but in the sense of contribution to the comfort and convenience of all men, through sharing the benefits of what the earth produces, it may be said that the future lies with the Western Hemisphere, and that its development has just begun.

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Thus, Panama is a true world-center, towards which converge lines of transportation from all quarters of the globe.

But, more than half a century before work on the Canal was begun, Panama, linking together the northern and southern continents, was looked upon as an American center and common meeting-place. Here it was that assembled the first international conference of American states, known in history as the Congress of Panama. In this way the name Panama came to be emblematic of the idea of American union and American co-operation, now summed up in the word Pan Americanism.

Pan Americanism, as I have more than once taken occasion to remark, in no way implies hostility or antagonism to nations outside the Western Hemisphere. On the contrary, it denotes only the aspiration of fraternity among the American nations themselves. The supposition that it has another and less friendly meaning is not justified by the record. History, it is true, furnishes examples of combined international action on the part of states outside the Western Hemisphere for the coercion of states within it, but no example can be found of the combination of American Governments to coerce the action of states in other quarters of the globe. The essence of Pan Americanism is co-operation and mutual assistance.

This spirit has been well exemplified in the career of Dr. Porras. As a citizen of Panama, he may indeed be regarded as a favorite son. When Panama became an independent state, it found in him as a man of learning, of wide experience, and of varied attainments, an indispensable public servant. A lawyer by profession, a judge, a diplomatist, and a teacher of men, he exemplified the truth of the saying, to which, as the years roll by, I find that we more and more fervently subscribe, that a man is not older than he feels. It may truly be said of Dr. Porras that his public career has been characterized by the fact that he tends to look to the future rather than to the past. In the Fourth International American Conference, at Buenos Aires, I had the good fortune to be associated with him as a colleague, so that I am in a position personally to testify to the value of his labors and of his attitude in the deliberations and the work of that body. Thrice a member of the Assembly of the Republic of Panama, diplomatic representative of the same Republic in the United States and in other countries, delegate to the second Peace Conference at The Hague, member of the Permanent Court of The Hague, and President of his country from 1912 to 1916, he is now recalled by his countrymen again to bear the burdens and responsibilities of the highest honor which it is in their power to bestow. While I recognize the fact that the choice of rulers is a matter peculiarly within the prov-

ince of the people of each country, yet I venture to say that the action of the people of Panama in choosing Dr. Porras as their chief executive magistrate is universally acclaimed and applauded throughout the Americas.

I have the honor to propose the health of Dr. Belisario Porras, President-elect of the Republic of Panama, and to wish him all prosperity in his future career.

THE BRITISH ATTITUDE TOWARD CONFISCATION¹

To the Editor of *The Nation*

Sir :

Referring to the editorial paragraph in *The Nation* of November 10, in which the supposed "renunciation" by Great Britain of the confiscation of German private property is praised as "a notable act of conciliation and good faith," I beg leave to point out that the press reports on the subject seem to have produced an erroneous impression. All the British Government did was to announce that it did not intend to exercise its right under paragraph 18, Annex II, Part VIII, of the Treaty of Versailles, to make further seizures of the property of German nationals in Great Britain, in case of voluntary default by Germany in respect of her reparation obligations. The paragraph in question reads :

The measures which the Allied and Associated Powers shall have the right to take, in case of voluntary default by Germany, and which Germany agrees not to regard as acts of war, may include economic and financial prohibitions and reprisals and in general such other measures as the respective Governments may determine to be necessary in the circumstances.

The British Government did not even make a general renunciation of the right reserved in this paragraph, but merely declared that, in case such measures should be taken, they would not include the seizure of the property of German nationals in the United Kingdom or under its control, whether such property was in the form of bank balances or of goods in British bottoms or of goods sent to that country for sale. In the House of Commons, on October 28, Mr. Austen Chamberlain, speaking for the Government, explained that this decision was not taken in consequence of German representations nor "dictated by regard for German interests," but was inspired by the fact that the threat of future seizures "injuriously affected British in-

1. Reprinted from *The Nation*, CXI (November 24, 1920), 593.

terests without offering any real security for the execution of the Treaty," since it would necessarily have the effect of keeping private German property and in particular private bank balances out of the country. The paragraph had, he said, in fact operated "merely to keep business away from London and to make Germans keep their balances in neutral currencies, a course which was inconvenient to all parties and involved clear loss" to Great Britain "without any countervailing advantage." In reply to the criticism that the British Government had acted without the concurrence of the Allies, Mr. Chamberlain stated that the words of the paragraph clearly left it "to the respective Governments" to determine what action might be necessary thereunder; that, in the opinion of the British Government, it would have been both unnecessary and undesirable to seek to share the responsibility of the decision with the other Allies, but that the decision when reached was, as a matter of courtesy, immediately communicated to the other Powers through the Ambassadors' Council, and also to the Reparation Commission through the British delegate.

The dissatisfaction said to have been created in France by the decision of the British Government no doubt was due to the general sense of disapproval in that country of any action tending in any way to relax the enforcement of the reparation clauses of the Treaty of Versailles.

John Bassett Moore.

New York, November 9, 1920.

(In this case, once more, *The Nation* was misled by incorrect press reports, on which the paragraph in question was based. A dispatch from Paris printed in *The New York Times* of October 28 stated that "the French Foreign Office received official notification today that Great Britain renounces the right of confiscation of German property in the United Kingdom." Editor, *The Nation*.)

ADDRESS IN HONOR OF DR. VICTOR ANDRÉS BELAUNDE OF PERU¹

ON several comparatively recent occasions the Pan American Society has had the privilege of extending hospitality to statesmen holding exalted political positions in their respective countries. To-day we entertain a dis-

1. At the Pan American Society luncheon in honor of Dr. Victor Andrés Belaunde, December 18, 1920, at the Hotel Astor, New York. Reprinted from *The Pan American Review*, Vol. II, No. 5 (December, 1920).

tinguished writer, teacher and lecturer from our sister Republic of Peru. We salute him as a representative of the culture and intelligence of the American countries. I present him in this character rather than in the character of an "intellectual." While "intellectuals" may demand our homage, the term itself may be regarded as somewhat dubious. Although an "intellectual" may be a man of culture and intelligence, the inference is by no means necessary. There is a difference. A man of culture and intelligence knows something, while an "intellectual" conceivably may be a man who thinks he knows something. The one sees things as they are; the other perhaps exhibits a tendency to see things as he emotionally feels they ought to be. A man of culture and intelligence is likely in some measure to accept things as they are, while an "intellectual," possibly seeing nothing but evil in the existing order, conceivably may not be indisposed wholly to overturn it without regard to the consequences. Perhaps we may say that the two categories are respectively distinguished by the characteristics of cerebration and over-cerebration.

Dr. Belaunde, as a man who deals with everyday realities as well as with ideals, proposes to say something today on economic conditions in his own country. In such a topic the members of the Pan American Society are necessarily interested. We have not got beyond the point of regarding food and even raiment as being among the essentials of human existence, and so long as we make this admission we shall continue to be interested in commercial, financial and industrial conditions, and in the production and exchange of commodities.

At the present time the world is suffering from an unwonted strain on credit, due to the great destruction of values during the recent world-war, to say nothing of the international and civil conflicts still going on. This particular phase it is not, however, my purpose to discuss. But, as our guest of honor is to speak of conditions in a country geographically somewhat distant from that in which we are now assembled, I will venture to speak a few words on a subject of permanent interest. I mean the subject of foreign investments.

As time goes on, the merchants, manufacturers and financiers of the United States will be more and more obliged to look this subject in the face. During the past hundred years the United States has distanced all other countries in commercial and financial expansion within its own borders. This has naturally resulted in an enormous demand for capital for internal development. In former times this capital was supplied largely from abroad, and the domestic supply, being entirely inadequate to meet the demand, was almost wholly absorbed at

home. The past ten years have wrought a significant change in this particular, and from this time on we may expect the American people to look more and more to the investment of their money abroad.

Under previous conditions our people were accustomed to make investments within the range of their individual physical vision or contact. This habit was naturally reflected in a certain distrust of investments beyond such vision or contact. Sometime ago I had a talk with a gentleman, who after making a fortune in the sound, sturdy, and prosperous State of Texas, returned to end his days in the distant State in which was his original home. Several years after his return he began gradually to call in his investments, for no other reason than that he preferred to have his money where he could see it. It is certain that his excellent investments in Texas were no safer while he lived there than they were after he left; but, having all his life been accustomed to have his investments within the range of his personal vision or contact, he began to feel uneasy when he began to think of them at a distance.

We should be mistaken if we were to identify this habit with an unwillingness to speculate. The people of the United States are not and never have been characterized by an unwillingness to take chances. They have passed through periods of speculation which they might without immodesty challenge the people of other countries to exceed. They have been willing and often enthusiastic to hazard their money, but have desired to see the turning of the wheel, so that they might enjoy all the emotions, whether of pleasure or of pain, attending the increase or the disappearance of what they had staked.

The situation of the great commercial and industrial nations of Europe, with a development of native resources running far into the past has been altogether different. For generations the capitalists of those countries have been obliged to seek opportunities abroad, and consequently have become accustomed to distant ventures. Indeed, comparing the returns of what they invested abroad with the returns of what they invested at home, they often could say that distance lent enchantment to the view. London has maintained its position as the world's money center in no small measure because of the fact that it is the great center of international investment and speculation.

Another thought which it is well to bear in mind is that the stability or instability of local political conditions is by no means always correspondingly reflected in the stability or instability of investments in local industry and commerce. It is quite possible for a revolutionary change in government to be milder in its effects and to be attended with less excitement

and bloodshed than might have marked an ordinary election. Such a change, promptly effected, may also be less trying to the candidates, who escape the physical and mental hardships and fatigues which candidates for office in the United States, dragged across the country in special trains or whisked from point to point by motor, are now compelled to undergo. It is also well to bear in mind that no country can boast an assured immunity from political disturbances and civil strife. Within recent days we have seen the most stable governments totter and fall as the result of changes in the popular attitude induced not so much by changes in political conceptions as by economic chaos.

Concerned, as we are today, with economic conditions throughout the world, we necessarily feel a profound interest in those that prevail in the Americas, where, in so many quarters, as I have often taken occasion to remark, the growth of commerce and industry has in a relative sense barely begun. The country of which Dr. Belaunde is a citizen is a land of great natural resources and of great possibilities, which its enlightened and progressive Government is anxious to develop. In respect of some of its products its position is unique, and in course of time it will contribute more and more to the satisfaction of the needs of men all over the world.

I esteem it an honor as well as a pleasure to present to you Dr. Belaunde.

MEDIATION IN THE BOUNDARY DISPUTE BETWEEN HONDURAS AND NICARAGUA¹

I. NATURE AND NOVELTY OF THE NICARAGUAN THEORY

THE Brief for Nicaragua frankly admits (p. 2) that the object of that government is to obtain a "new arbitral award." The entire Brief is accordingly devoted to an effort to show that the Award rendered by the King of Spain on December 23, 1906, should be discarded as null and void. But for this fact, we might be startled at finding the theory advanced (p. 3) that Nicaragua, by objecting to the Award of the King of Spain on the ground of nullity and moving for the establishment of an arbitral court to determine that question, legally suspended the obligation of the Award, on the supposition that, as the Brief states, "a proceeding of that nature has the effect, in international law, of suspending *ipso jure* the execution of any arbitral judgment."

The mere challenging of an arbitral award on the ground of nullity, with a motion for the establishment of an arbitral court to determine that question, may indeed result in a suspension of performance, in the sense that the party making the challenge may *in fact* also refuse to execute the award; but in no sense can such challenge and refusal be said to suspend the obligatory force of the judgment. To admit such a doctrine would in effect be to convert international arbitration into a mere aleatory process. An award would not *prima facie* be worth the paper on which it was written. The process would contain no element of permanency or of stability. There is no principle that would protect the second award against challenge any more than the first; nor the third, the fourth, the fifth, or any subsequent decision from exposure to the same fate. Like the biting of Swift's fleas, the succession might run on *ad infinitum*. The end of the game of chance could be expected to occur only when the players had become satiated, fatigued or broken.

Nor are we furnished with any authority that sustains, either expressly or by implication, the novel theory thus advanced. It is true that Kamarowsky is immediately cited, and from this fact we necessarily infer that the passage quoted

1. Examination by John Bassett Moore, Counsel for Honduras, of the brief for Nicaragua, 1920.

from him was supposed to countenance the contention; but this supposition is altogether fallacious. Had the text of Kamarowsky been more carefully examined and the quotation of it carried farther, it would have been found that his opinion was fatal to the contention of Nicaragua in regard to the *legal* suspension of the execution of arbitral awards.

The passage quoted from Kamarowsky reads as follows:

States, in establishing commissions, bind themselves, in general solemnly and in good faith, to execute their determinations. In some more recent conventions, we find on this point expressions too absolute: The governments bind themselves to put them into execution "without any objection, evasion or delay." It is evident (*constant*) that States cannot abdicate their sovereign right to review such decisions, in order that they may assure themselves how the commissioners, in taking their determinations, have conformed to the stipulations of the agreement, to the juridical evidence of the documents which were presented to them, and to the general principles of international law.

Here the quotation in the Brief of Nicaragua ends. But Kamarowsky goes on to say that he prefers the form of clause used in the claims agreement between the United States and Spain of 1871, which reads as follows: "7. The two Governments will accept the awards made in the several cases submitted to the said arbitration as final and conclusive, and will give full effect to the same in good faith and as soon as possible." Kamarowsky, as he indicated, preferred this form, because, while it declared the awards to be "final and conclusive," it was not expressed in terms which, if literally construed, might seem to preclude the presentation, in any case of any "objection" whatsoever, even though it should be made on grounds on which an award may properly be impeached. But, having thus explained his position, the learned author proceeds to declare:

In criticizing the terms of certain conventions relative to the execution of arbitral judgments, *we do not recognize the necessity of such an engagement in those conventions*. When States have recourse to arbitration in order to resolve by that means their disputes, they are evidently obliged, not only morally, but also juridically to submit to the sentence of the judges whom they have freely chosen, provided of course the judges have not gone outside of (*outrépassé*) their powers. As to the review of their determinations, of which we have spoken, *it implies in itself neither appeal nor cassation (elle n'implique en soi ni appel ni cassation)*.^{1a}

It thus appears that, when Kamarowsky spoke of the review of arbitral judgments, nothing could have been farther from his thought than the supposition that the challenge of an

1a. Kamarowsky, *Le Tribunal International*, pp. 181-182.

award on the ground of nullity, by one of the parties to an arbitration, operates either (1), like a judgment of cassation, legally to annul the award, or (2), like an appeal, legally to stay its execution. On the contrary, clearly perceiving that such a situation could arise only in case the contracting parties, instead of stipulating that the award should be final and conclusive, had mutually agreed that it should be subject to reversal or revision, he expressly denies that the challenge of either party can either destroy the award or suspend its legal force or obligation. The story is told of an unfortunate prince, who, inadvertently waving a magic wand, evoked a spirit that tore him in pieces. Nicaragua, in summoning Kamarowsky, has hardly fared better.

It is remarkable that, while the unquoted part of Kamarowsky is so disastrous to the Nicaraguan theory, a passage quoted farther on from another distinguished authority, Fiore, also categorically contradicts that theory. I reproduce the passage just as it appears in the Nicaraguan Brief (pp. 7-8), with italization and capitalization, as follows:

The mere expression by a state of its disinclination to execute an arbitral award on the ground of its nullity is not in itself sufficient to relieve that state of the obligation imposed upon it to execute the award in good faith; *the party impugning the validity of the award on the ground of its nullity is justified only in SUSPENDING ITS EXECUTION* on that ground, and as such disinclination *would give rise to a new question*, that is, whether the award of the arbitrators could or could not be impugned for the causes above mentioned, and as it *could not be admitted* that the very party who thus questions the award could alone be the judge of its validity, A NEW ARBITRATION WOULD NEED TO BE INSTITUTED BEFORE NEW ARBITRATORS who would thereunder be confined to a consideration of the question whether the claim of nullity were legally sound, or whether it should be rejected, and without going into the merits decided by the original arbitral award. To such new arbitration should be applied the rules prescribed for international arbitration, and *it must be admitted THAT PENDING THE DECISION OF THE QUESTION OF NULLITY, EXECUTION OF THE ORIGINAL AWARD MUST BE SUSPENDED.*

The engrossing fascination of the word "suspend," or "suspended," seems to have distracted attention from the fact that Fiore clearly and explicitly affirms that the challenge on the ground of nullity has of itself no legally suspensive effect. In the most precise terms he expressly declares that "the mere expression by a state of its disinclination to execute an arbitral award on the ground of its nullity *is not in itself sufficient to relieve that state of the obligation imposed upon it to execute the award in good faith*"; that the actual suspension of the

award could only give rise to the question whether it was open to the objection, and that it "*could not be admitted that the very party who thus questions the award could alone be the judge of its validity.*" The eminent Italian authority then goes on to suggest that a way out of the difficulty would be a new arbitration; but he says that the arbitrators in such case would "be confined to a consideration of the question of nullity and to a decision of the question whether the claim of nullity were legally sound, or whether it should be rejected, and without going into the merits decided by the original arbitral award. *"To such new arbitration,"* continues Fiore, "the rules prescribed for international arbitration" should be "applied," and "pending the decision of the question of nullity, execution of the original award must be suspended." Evidently the learned Italian publicist never dreamed that the mere challenge on the ground of nullity, with or without an offer of a new arbitration, could operate legally to suspend the execution of the award. On the other hand, he with equal clearness perceived that the actual institution, by the common agreement of the parties, of a new arbitration, to determine the question of nullity, would necessarily operate meanwhile as a legal stay of execution.

In thus calling attention to the actual position of Fiore, as clearly stated by himself, I have been content to use the English version given in the Brief of Nicaragua; but I have found on examination that the version must have been based upon an imperfect text. The numbers of the sections and the paging show that the text from which this version was made was the second edition of Moreno's Spanish translation of Fiore, published at Madrid in 1894; but it is evident that the transcript used in making up the Nicaraguan Brief was faulty, although the mistakes and omissions are not very material. As an appendix to the present Examination, I give both the Spanish text and the corresponding original Italian text, from which Moreno's Spanish Translation was made. The original Italian text which is given in the appendix is from an edition of Fiore preceding that which Moreno used in his second edition, but a comparison of the Spanish translation with the original Italian will show that Fiore had made no changes in the text of this part of his work.

Taking the original Italian and the Spanish translation together, their meaning appears to be precisely reproduced in the following English version (the numbering of the sections being that found in the Italian text before me):

1,309. In one case only can a state refuse to execute an arbitral sentence, namely: when such sentence can be shown to be vitiated

by the defect of nullity. The grounds on which the action of nullity may be founded must, in our opinion, be the following:

1. If the arbitrators have decided *ultra petita*, that is, outside the limits set by the arbitral agreement, or if the arbitral agreement was null or had lapsed.

2. If the sentence has not been rendered with the participation of all the arbitrators in full session.

3. If the award has been rendered by a person who had not the legal or moral capacity to be an arbitrator, or by a substitute who was not duly authorized to act as such.

4. If the ground of the sentence is not stated, or if it contains provisions that are inconsistent one with the other or that are impossible of execution.

5. When the sentence is based on error or has been obtained by fraud.

6. When the procedural formalities stipulated in the arbitral agreement, on pain of nullity, or those which must be considered as indispensable according to the common law because demanded by the nature of the case, have not been followed. . . .

1,310. The simple protestation (opposizione) by a state of its unwillingness to execute the arbitral sentence by reason of the defect of nullity, cannot be of itself sufficient to release such state from the obligation assumed by it to execute the award in good faith, and only can justify the party who has impugned it on the ground of nullity in suspending its execution; and as such protestation would create a new controversy, that is, whether or not the sentence of the arbitrators could be impugned on the ground of nullity, and as it could not be admitted that the very party who adduces such ground could be a judge of its own claim, therefore it would be well to admit a new arbitral proceeding, which should be referred to new arbitrators, who should confine themselves to judging only as to the action of nullity and should settle whether this action ought to be regarded as well founded in law or whether it should on the other hand be rejected, and without going into the merits of the question which was the subject-matter of the arbitral sentence. To this new proceeding there should be applied the rules prescribed for international arbitration, and only this much should be admitted; that, during the time necessary for the decision on the action of nullity, the execution of the arbitral sentence must be suspended.

Except for the very faulty reproduction in the Brief for Nicaragua of the grounds of nullity stated by Fiore, as found both in the Italian and in the Spanish text, it may be observed that the English version just given chiefly serves to make clearer and to confirm what I had already pointed out as the obvious position of Fiore, as shown upon the face of what is set forth in the Nicaraguan Brief; and at this point, in order that the views of Fiore on the question of "nullity" may be completely and conveniently set forth in one place, I will sup-

ply here his full exposition of his reasons, as found in the original Italian and in the Spanish translation.

In order to make clear the grounds on which it seems that the action of nullity must be based, it should be observed that, as the arbitral agreement must determine the subject-matter in question and the arbitrators cannot decide as judges, except on what concerns it or on something which is in the intention of the parties closely connected with it, we can understand the reason why the sentence can be impeached as null on the ground indicated in the first number.

In what concerns the second ground, we have said that it is essential to the validity of the deliberation on each question that all the arbitrators meet in full session and that the decision results from an act drawn up by a majority.

As concerns the fourth ground, it will be observed that, even with the greatest latitude of judgment allowed to the arbitrators, it is inconceivable that the decision can be rendered absolutely without any statement of the grounds. It may, however, be conceded that a full and formal explanation of all the questions discussed and decided is not absolutely required, but a summary indication of the reasons which constitute the ground of the dispositive part of the judgment must always be considered indispensable in order to ascribe to the sentence the authority of a case finally adjudicated. Nor can we consider, as a sentence that definitively puts an end to the suit, one in which the decision is confused, or when in the dispositive part there exists an evident contradiction which makes it impossible or very difficult to establish with exactness and precision what has been decided.

Nor would the arbitral tribunal be competent, if, when called upon to decide as to the satisfaction due by one state to another offended by it, it had condemned the offender to perform acts which involve an attempt against the independence of the state or against its dignity or its honor. We must, with reason, consider as null, because of impossibility of execution, a sentence which involves an attempt against the inalienable rights of the state.

In what concerns the error dealt with in No. 5, as a ground of nullity, it must be observed that we refer to error regarding the thing which has been the principal object of the arbitral agreement and which has been the ground of the decision, and not to an error regarding one of the non-essential elements of the case, such as could have been or can be corrected. As concerns this, the right of the party to ask that the error be corrected must always be considered as saved, but the entire sentence cannot for this reason be considered as null.

As to the sixth ground, it must be observed that, by reason of defect of procedure, the sentence cannot be attacked as null, except when the parties themselves have established in the arbitral agreement the procedural forms which must be observed under penalty of nullity. However, since certain formalities must be considered as essential and indispensable by reason of the very nature of the case and the logic of the law, the failure to observe them can justify the

action of nullity. This can be said, for instance, if one of the states interested in the controversy has not been heard or has not been placed in a position to sustain its demands and to defend its own rights.

It should be superfluous to remark that the effect of a challenge of an award by one of the parties on the ground of "nullity" cannot be enhanced by coupling with such challenge an offer to create a new arbitral tribunal. Such an offer is necessarily equivocal. It would naturally be made, if the challenging party wished to prevent the inference that, having once failed to establish its claims by arbitration, it intended or desired in the future to avoid the judicial process altogether. But the offer can impart no legal force to the challenge, which, in the absence of a previous agreement for a review, cannot of itself impair the obligation of the judgment.

Obviously, it is only by the common or concurrent act of the contracting parties that the agreed finality of the award can be legally set aside or suspended. In the absence of such an act, an objection by one of the parties can at most be regarded only as an appeal to the good-will and friendly consideration of the other party, the award meanwhile remaining *prima facie* legally valid.

This is, we must admit, directly contrary to the new Nicaraguan theory of legal suspension by challenge for nullity. By this theory it is necessarily assumed that the objection of the challenging party, who naturally will be the losing party, not only has a legal efficacy superior to that of the treaty and of the award but at once reduces the other party to a state of indefinite legal helplessness. But, until the world shall have become convinced that, in international arbitration wrong usually triumphs—and in that event international arbitration would inevitably disappear—we may rest assured that no such rule will ever prevail, and that it will continue to be the law that, in the absence of an agreed method of rehearing or revision, the party to whom the objection is presented will be legally free to weigh and to reject it, and to insist on the performance of the award.

This view—the view of Kamarowsky and of Fiore, and, we may say, of all the authorities—is incorporated in the great conventions of The Hague, of 1899 and 1907, for the Pacific Settlement of International Disputes. "The Arbitration Convention implies the engagement to submit loyally to the Award" (1899: Art. 18). "Recourse to arbitration implies an engagement to submit in good faith to the Award" (1907: Art. 37). "The Powers who have recourse to arbitration sign a special Act (*Compromis*), in which the subject of the differ-

ence is clearly defined, as well as the extent of the Arbitrator's powers. This Act implies the undertaking of the parties to submit loyally to the Award" (1899: Art. 31). "The Award, duly pronounced and notified to the agents of the parties at variance, puts an end to the dispute definitely and without appeal" (1899: Art. 54). "The Award, duly pronounced and notified to the agents of the parties, settles the dispute definitely and without appeal" (1907: Art. 81).

Both Conventions then proceed to point out (1899: Art. 60; 1907: Art. 83) in identical terms, how the parties, if they wish to do so, can provide for a legal revision of the award:

The parties can reserve in the "Compromis" the right to demand the revision of the Award.

In this case and unless there be an Agreement to the contrary, the demand must be addressed to the Tribunal which pronounced the Award. It can only be made on the ground of the discovery of some new fact calculated to exercise a decisive influence upon the Award and which was unknown to the Tribunal and to the party which demanded the revision at the time the discussion was closed.

Proceedings for revision can only be instituted by a decision of the Tribunal expressly recording the existence of the new fact, recognizing in it the character described in the preceding paragraph, and declaring the demand admissible on this ground.

The "Compromis" fixes the period within which the demand for revision must be made.

In addition to this clause, we find in the Convention of 1907 the following stipulation (Art. 82): "Any dispute arising between the parties as to the interpretation and execution of the Award shall, in the absence of an agreement to the contrary, be submitted to the Tribunal which pronounced it."

By the foregoing clauses it appears that The Hague Conferences (1) adopted and confirmed the principle of the finality of awards, but (2), recognizing the legal consequences of this principle, sought, in connection with the establishment of a Permanent Court, to provide a legal method of resolving possible disputes as to the effect of the arbitral decision, instead of leaving to the successful party the sole alternative of an appeal to good faith or a resort to coercion. They therefore provided that the parties might "*reserve in the Compromis the right to demand revision of the award,*" but limited the right of the case of the subsequent "discovery of some new fact calculated to exercise a decisive influence upon the Award." The Convention of 1907 goes a step farther, and provides for the case of a dispute "as to the interpretation and execution of the Award."

From the outcry sometimes raised by unsuccessful litigants,

one might infer that the principle of finality is peculiar to international arbitration. In reality, it is a principle common to all judicial proceedings. It is a maxim of jurisprudence that the public interest requires an end of litigation. In municipal law, appeals are definitely limited. In the international sphere, as between independent and sovereign states, whose disputes involve the possibility of war, it has been conceived to be of the highest importance that their differences should be settled both promptly and finally, and that, when arbitration is employed avowedly for that purpose, the award, rendered after full hearing, should be regarded not as an invitation to capricious objections, to patriotic appeals and to international recriminations, but as a definitive adjudication to be accepted and loyally carried into effect in a manner comporting with the voluntary commitment of the parties, the dignity of the proceeding, and the solemnity of the issues.

II. THE QUESTION OF "NULLITY"

There is no way in which the efficacy of arbitration, as a means of settling international disputes, could be more effectively destroyed than by permitting arbitral awards to be attacked and disregarded on technical and contentious grounds. This fact is recognized in the stipulation generally found, in one form or another, in arbitral agreements, that the award shall be treated as final and conclusive, and shall be executed without evasion or delay. It may, however, at once be admitted that this does not mean that in no case whatsoever, no matter what the circumstances may be, an award cannot be attacked on the ground of its character or by the means by which it may have been obtained.

"From the fact," says Calvo, "that the arbitral sentence is obligatory and without appeal, we must not draw the absolute consequence that the parties cannot combat it; there are, on the contrary, certain cases in which they are fully justified in refusing to accept and to execute it."¹

The question whether and when an international award may be treated as null was the subject of extended examination and discussion by the Institute of International Law (*Institut de Droit International*) in 1874 and 1875; and the history and result of its deliberations, representing the opinion of a body of eminent publicists, merit consideration. The discussion of the subject began with the presentation by Dr. Goldschmidt, a member of the Institute, at Geneva, in 1874, of a project for

1. Calvo, *Le Droit International*, III, §1774, pp. 485-486. See also, Riquelme, *Elementos de Derecho Publico Internacional* (Madrid, 1849), I, 126; Woolsey, *International Law* (5th ed. 1883), p. 405; 6th ed.

a statute to regulate the proceedings of international arbitral tribunals (*Projet de Règlement pour Tribunaux arbitraux internationaux*), in which the question of nullity was dealt with in great detail.² When the project came up for debate, Mr. Mancini, the eminent Italian statesman and jurist, proposed, in place of Dr. Goldschmidt's more elaborate provisions, the following brief clause, which was adopted:

The arbitral sentence is null in case of a null agreement, or of excess of power, or of proved corruption of one of the arbitrators, provided it made a majority, or of essential error caused by the production of false documents.

The agreement shall determine before what persons or faculties of law or constituted bodies the appeal of nullity shall be brought and within what term.³

The project as thus amended was referred to a committee originally composed of Messrs. David Dudley Field, Goldschmidt, de Lavelle, and Pierantoni, but afterwards enlarged by the addition of Messrs. Bulmerincq, Marquardsen, and Alphonse Rivier. The committee also called to its aid certain specialists.⁴

The report of the committee was presented at The Hague, in 1875. When it was taken up for discussion, Mr. Rivier, acting as report in the absence of Dr. Goldschmidt, proposed, as a substitute for the Geneva resolution on the question of nullity, the following: "The arbitral sentence is null in case of a null agreement, or of excess of power, or of proved corruption of one of the arbitrators or of essential error."

M. Rivier said that the committee, sharing the opinion of M. Goldschmidt, considered proved corruption to be sufficient to establish the nullity of the arbitral sentence, whatever had been the result of the corruption. Essential error also should suffice, even when it was not caused by false documents, but, for example, by false testimony. M. Pierantoni did not think that he was prepared to admit error as a cause of nullity of the agreement. Besides, the term "essential error" was very vague. This opinion was strongly combatted by M. Neumann, who cited examples of error of this kind, and concluded that it was impossible not to authorize the annulment of the arbitral sentence on this ground.

The text of the committee was put to a vote, and, receiving the approval of a majority, was adopted.⁵ It was as follows: "Art. 27. The arbitral sentence is null in case of a null agree-

2. *Revue de Droit International*, VI (1874), 421.

3. *Idem*, p. 595.

4. *Annuaire de l'Institut*, I, 31-32, 45.

5. *Revue de Droit International*, VII (1875), 277; *Annuaire*, I, 84-87.

ment, of an excess of power, or of proved corruption of one of the arbitrators or of essential error.”⁶

M. Pierantoni has stated, in an opinion published in 1898, that, by “excess of power,” The Institute understood as well the case of a sentence decreed outside of (*en dehors*) as that of a sentence decreed beyond (*au delà*) the terms of the agreement.⁷

I will consider the grounds of nullity mentioned in the resolution of the Institute, in the form there stated as well as in other forms stated by various writers.

1. *Lack of a Valid Agreement*

That an award may be held to be invalid, if it was rendered without a valid agreement between the parties, or under an agreement that had become null or extinct, is generally admitted.⁸ The discussions under this head are, however, characterized by a certain vagueness, and by an absence of concrete applications. For the most part they are concerned with conjectural questions as to the power of States to contract away, by submission to arbitration or otherwise, matters of “life” and “death,” involving their national “existence,” their national “independence,” or their national “honor” or “integrity,” and the utterances of writers in regard to them are usually rhetorical rather than argumentative.⁹

With questions of this kind we are not here concerned, since it is impossible to allege that it is not within the power of States to submit disputes as to their boundaries to arbitration. For centuries arbitration has been employed for this purpose; and it is and has been considered an especially appropriate method for the settlement of differences of that character, whose determination so largely depends on questions of law and of fact.

But there is one phase of the subject, of profound practical importance, that deserves our present attention, and that is the situation of a state that co-operates in carrying out the arbitral agreement, and then, after an award has been rendered which it does not regard as satisfactory, seeks to avoid its execution by attacking the validity of the agreement under which the award was made. This phase is directly dealt with by the eminent publicist just cited, whose authority is not, I

6. *Idem*, p. 133.

7. *Revue de Droit International*, XXX (1898), 456-457.

8. Heffter, *Le Droit International* (Bergson ed. by Geffcken, 1883), §109, p. 240.

9. Mérignhac, *L'Arbitrage International*, p. 184 *et seq.*

believe, invoked in the Brief for Nicaragua, which naturally leaves this phase of the subject untouched.

After having discussed the causes of nullity which had been claimed to vitiate the agreement to arbitrate (*le contrat de compromis*), Mérignhac recurs (p. 304) to the subject and says:

313.—The agreement may be vitiated by different causes of nullity which we have considered in Chapter I of Book II of the first part of this work, especially from the point of view of the character of the public law of contract and the consequences which result from that character.

When a cause of nullity exists, *the parties must invoke it before the arbitral tribunal*; and, if they continue to take part in the proceeding without raising an exception, they are considered as covering it by a tacit ratification (§32 of the project of M. Goldschmidt). When the nullity is denied, the arbitrator is competent to decide on that which concerns it, for he must be considered as judge, not only of the difficulties which the interpretation of the agreement raises, but as well of those which relate to its validity. If it were not so, as in the international sphere we have only the jurisdiction of arbitrators, the parties themselves would be compelled to decide the question of nullity, and would therefore have the right to destroy their contract at will. Without doubt, this result might lead to the nullity of the sentence; but that, in the present state of things, is inevitable. This, however, we can and must avoid, by considering, as we have done, that the arbitrators are in every respect naturally indicated to decide upon the causes of nullity of the arbitral agreement.

If one of the parties claims that the choice of one or of more arbitrators was due to an error or to a moral violence, the question would be disposed of by the tribunal which would decide in this case as in the case of a proposed legal exception. And, in the hypothesis where the cause would be referred to a sole arbitrator, the latter not being judge of a difficulty which touched him thus personally, the party raising the exception of nullity would then be authorized, if he judged the facts sufficiently grave, to withdraw from the arbitration, by notifying his decision to the other party with the supporting proofs.

The distinguished specialist in the subject of international arbitration, in laying down the foregoing rule, evidently regarded it as inconceivable that a state should be permitted silently to hold in reserve the question of the validity or continuing force of its own agreement, until it should have learned, by the results of the agreement's complete execution, whether it would be advantageous or disadvantageous to raise the question. Neither by the principles of international law nor by the practice of nations is such a claim countenanced.

In conformity with the rule laid down by Mérignhac are the provisions of The Hague Conventions.

In the convention of 1899, we find the following clauses :

Art. XLVI. They have the right to raise objections and points. The decisions of the Tribunal on those points are final, and cannot form the subject of any subsequent discussion.

Art. XLVIII. The Tribunal is authorized to declare its competence in interpreting the "Compromis" as well as the other Treaties which may be invoked in the case, and in applying the principles of international law.

In the convention of 1907, there are the following provisions :

Art. LXVII. After the close of the pleadings, the Tribunal is entitled to refuse discussion of all new papers or documents which one of the parties may wish to submit to it without the consent of the other party.

Art. LXVIII. The Tribunal is free to take into consideration new papers or documents to which its attention may be drawn by the agents or counsel of the parties.

In this case, the Tribunal has the right to require the production of these papers or documents, but is obliged to make them known to the opposite party.

Art. LXXI. They are entitled to raise objections and points. The decisions of the Tribunal on these points are final and cannot form the subject of any subsequent discussion.

Art. LXXIII. The Tribunal is authorized to declare its competence in interpreting the "Compromis," as well as the other Treaties which may be invoked, and in applying the principles of law.

Unless rules of this character existed, and were observed and enforced, it is needless to say that the resort to arbitration would be practically futile.

2. Excess of Power

Excess of power, deciding *ultra petita* or *ultra vires*, is, as we have seen, the second ground of nullity enumerated by the Institute of International Law.

The award of an arbitrator must be "confined to the terms of the submission."¹⁰

10. Wildman, *Institutes of International Law*, I, 186. See to the same effect, Rivier, *Principes du Droit des Gens*, II, 185; Oppenheim, *International Law*, II, 18, 27; Calvo, *Le Droit International*, §1774, pars. 1 and 5, III, 485-486; Bonfils, *Manuel de Droit International* (1901), §955, p. 532; Twiss, *Law of Nations*, II, 7-8; Hall, *International Law* (5th ed.), p. 363; Heffter, *op. cit.* (Bergson ed. by Geffcken, 1883), §109, p. 240; Fiore, *Nouveau Droit International*, II, 642; Fiore, *Diritto Internazionale Codificato*, II (4th ed. 1909), §1375, p. 506; Riquelme, *Elementos de Derecho Público Internacional*, I, 126; Bluntschli, *Le Droit International Codifié* (1895), §495, p. 281.

Woolsey says that an award is null, if "not rendered within the time specified," or if rendered "outside of the points submitted."¹¹

Says Pierantoni:

The jurisdiction of arbitrators being established by the sole will of independent States, it is certain that the judgment cannot depart from the limits of the contract of the agreement. Under the words "powers of the arbitrators" we include only the attributes which they hold from the agreement . . . In judicial systems legislators have attended to this and have provided ways of recourse against arbitral judgments. In international law, if the parties have not regulated the right of appeal or any other kind of recourse, the decision of the arbitrators will remain without remedy if it departs from the limits of the agreement. However general may seem to be the provision of the agreement, a sentence of arbitrators is open to attack by the diplomatic way for its nullification, if the arbitrators have not kept within the terms of the agreement. Indeed, outside the agreement, the arbitrators are without authority and without character. Their sentence, improperly called an arbitral judgment, is smitten with absolute nullity. Nullity exists for excess of power. *The sentence would not be null if they had judged badly.* In the first rank of causes of nullity we find excess of power.¹²

Mérignhac, discussing this question, says:

330.—Arbitrators may commit an excess of power of several kinds. In the first place, they will exceed their powers, if they grant to one party more than the agreement permitted, or than was demanded by such party either in the agreement or in the conclusions submitted at their bar. In the second place, they will exceed their powers if they go outside the mandate which was traced for them. Thus did the King of the Netherlands, who, in his arbitration between England and the United States, instead of choosing between the claims of the parties, made a new proposition, which the latter rejected, as was their strict right.

331.—We may further suppose that the provisions relative to the procedure to be followed, to the majority required, to the place where the tribunal must sit, to the periods fixed for rendering the sentence, to the principles laid down for the arbitrators, or to the statement of reasons have not been observed. In all these cases, no difficulty is possible; it suffices to compare the terms of the agreement or the conclusions of the parties with the official text of the published sentence, in order to perceive the nullity which will dispense with its execution. There must also be considered as constituting an excess of power, the fact that the arbitrators have refused to hear the parties or one of them, have accepted as representing the latter a person without authority, or have deliberated or voted to the exclusion of one or more members of the tribunal. The history of arbitration affords us very rare cases where excess of power has

11. *International Law* (5th ed. 1883), p. 405; (6th ed. 1891), p. 397.

12. *Revue de Droit International*, XXX (1898), 455-456.

been committed; the cause of nullity is therefore here more theoretical than practical.¹³

As Mérygnac truly observes, the examples of "excess of power" are rare, and we will present here such instances as are found.

(a) *Northeastern Boundary*

Of the cases in which an arbitrator may be held to have been guilty of an excess of power, one of the clearest is that in which, abandoning the performance of the judicial task which the parties have committed to him, he assumes the rôle of a mediator, and, instead of pronouncing a final judgment, incorporates in his so-called award a mere recommendation.

This is what happened in the case of the arbitration by the King of the Netherlands, in 1831, of the Northeastern Boundary dispute, between the United States and Great Britain.

The version given of this celebrated case, in the Brief for Nicaragua (pp. 8-9, 73), is that the United States, "by the consent of the Senate, determined not to consider as obligatory the award rendered . . . by the King of the Netherlands"; that "the refusal to execute the award was based on the fact that the royal arbitrator had decided the case when not authorized by the arbitral agreement"; and that this refusal was recognized by both parties as at once relegating them to their prior positions.

These allegations, which are altogether at variance with the record, betray an entire misapprehension as to the facts of the case. The United States did not refuse, either with or without the consent of the Senate, to execute the "award" because the arbitrator had "decided" the case when not authorized so to do. On the contrary, the action of the United States was governed by the fact, which the other party admitted, that the arbitrator had neither decided nor even professed to decide the fundamental question submitted to him, but, avowedly abandoning even the effort to decide it, had merely presented to the two governments a mediatorial recommendation, which they might or might not "adopt."

By Article II of the definitive Treaty of Peace between Great Britain and the United States signed at Paris September 3, 1783, it was provided that the boundary between the United States and the British dominions to the northeast should run as follows:

From the northwest angle of Nova Scotia, viz. that angle which is formed by a line drawn due north from the source of Saint Croix River to the Highlands; along the said Highlands which divide

13. *Traité Théorique et Pratique de L'Arbitrage International*, p. 313.

those rivers that empty themselves into the river St. Lawrence, from those which fall into the Atlantic Ocean, to the northwestern-most head of Connecticut River; . . . East, by a line to be drawn along the middle of the river St. Croix, from its mouth in the Bay of Fundy to its source, and from its source directly north to the aforesaid Highlands . . .

In running this line, it is evident that the basal fact to be determined was the position of the "highlands," but differences of opinion subsequently arose as to what elevations or series of elevations were intended by that name. These differences still existed when, after the second war between the United States and Great Britain, the plenipotentiaries of the two countries came to conclude a new peace. By Article V of the Treaty of Peace concluded at Ghent on December 24, 1814, provision was made for the appointment of commissioners jointly to survey and determine the line. This was done, but it resulted in a disagreement. For such a result the treaty had provided by stipulating that the differences of the commissioners should be referred "to some friendly sovereign or State"; and the two governments engaged "to consider the decision of such friendly sovereign or State to be final and conclusive on all the matters so referred."

By a convention signed on September 29, 1827, the two governments agreed to submit the dispute to arbitration; to proceed in concert to the choice of a friendly sovereign or State as arbiter; to lay before him all "statements, papers, maps, and documents"; to treat his "decision" as "final and conclusive"; and to carry it, without reserve, "into immediate effect, by commissioners appointed for that purpose." As arbitrator, they agreed on the King of the Netherlands.

The "award" of the King, delivered on January 10, 1831, did not purport to decide the principal point in dispute, but on the contrary expressly disclaimed any purpose so to do, giving as a reason that the claims of the parties and the proofs submitted by them did not furnish a basis for a decision. He did not even exercise the power the treaty gave him to order "additional surveys to be made of any portions of the disputed boundary line or territory, as he may think fit," declaring that the circumstances on which a decision depended "could not be further elucidated by means of fresh topographical investigation, nor by the production of additional documents." He therefore abandoned the attempt to render a decision, and instead recommended what he conceived to be a line of convenience, expressing the opinion that it would be "suitable" (*il conviendra*) for the contracting parties to "adopt" (*adopter*) it.

On January 12, 1831, immediately on receiving this docu-

ment, Mr. Preble, the United States minister at The Hague, on his own responsibility, addressed to the Minister for Foreign Affairs a respectful protest in which he pointed out that the action of the arbitrator, in recommending a substitute for the treaty line, constituted "a departure from the powers delegated by the high contracting parties." The arbitrator's assumptions were in fact altogether erroneous, as it was afterwards shown by the surveys of British engineers, in an inter-provincial arbitration between Canada and New Brunswick, that the highlands, as claimed by the United States, actually existed, and that it was entirely feasible to run the line under the treaty of 1783.¹⁴

The dispute covered an area of 12,027 square miles; and as the line proposed by the arbitrator, on the assumption that the treaty line could not be run, would have given 4,119 square miles to Great Britain, his recommendation was obviously advantageous to that government. Accordingly, Lord Palmerston, then Foreign Secretary, promptly instructed the British minister at Washington that His Majesty's Government had not hesitated to "acquiesce" in it, but directed him, in case the American government should support Mr. Preble's protest, to write home for instructions.¹⁵ Subsequently, his lordship sent a dispatch urging the acceptance of the award by the United States; but on the same day he sent another dispatch authorizing his minister to "intimate privately" to the Secretary of State that the "formal acceptance" of the award would not preclude the two governments from modifying "the terms of the arrangement" laid down in it.¹⁶ His lordship's real views are more explicitly set forth in a yet later instruction, in which he states that, as to the northwest angle of Nova Scotia and "the highlands along which the boundary is from that angle to be drawn," the arbitrator had "declared that it is impossible to find a spot, or to trace a line," which should fulfil all the conditions required by the words of the treaty; that he consequently had "recommended" a line which he had conceived to be "conformable with the spirit of the treaty, and to approach the most nearly to the probable intention of its framers," and this line the British Government was "still willing to adopt." Thus fully was it recognized that the arbitrator had rendered no decision, but had undertaken to discharge the recommendatory function of a mediator.¹⁷

The position of the United States was officially communi-

14. Moore, *International Arbitrations*, I, 157-160.

15. *British and Foreign State Papers*, XXII, 772.

16. *Idem*, p. 783.

17. *Idem*, pp. 826-828.

cated to the British Government in a note of Mr. Livingston, Secretary of State, to Mr. Bankhead, British minister at Washington, of July 21, 1832. Had the arbitrator, said Mr. Livingston, decided the question submitted to him, "no question could have arisen as to the validity of the decision." But he had not done so. He seemed, on the contrary, "to have abandoned the character of Arbitrator, and assumed that of Mediator, advising both parties that a boundary which he describes should be accepted, as the one most convenient to them." This had rendered it obligatory on the President to submit the whole subject to the Senate for its advice, just as he was obliged in the first instance to obtain the Senate's approval of the treaty of arbitration; and the Senate had passed a resolution advising the President to open a new negotiation for the ascertainment of the boundary.¹⁸ The British minister at Washington, in acquainting his government with the action of the Senate, which had voted 35 to 8 against "adopting" the line proposed by the arbitrator, commented on the "unfortunate wording" of the "award," "which might imply mediation as well as decision."¹⁹ The British Government subsequently agreed to enter into new negotiations "in the most friendly spirit and with the most sincere desire to arrive at a settlement mutually beneficial to both countries," and, pending the negotiations, to abstain from extending the exercise of jurisdiction in the disputed territory beyond the limits within which it had previously been exercised.²⁰ This provisional agreement as to the exercise of jurisdiction resulted from the circumstance that the two governments, having concurred in disregarding the arbitrator's recommendation, were relegated to the positions which they had before respectively occupied.

The line was finally settled by a direct agreement between the two governments in the so-called Webster-Ashburton Treaty of August 9, 1842.

It is evident that Renault was altogether correct in saying: "This (the award of the King of the Netherlands) was not a true sentence: the arbitrator did not fulfil his mission, which was to judge, and he did not do that which was requested of him; in reality, he played the part of a spontaneous mediator, suggesting an amicable solution of the difference."²¹

It is equally evident that this case lends no support whatever to the various contentions of Nicaragua in the present Mediation.

18. *Idem*, pp. 788-790.

19. *Idem*, p. 791.

20. *Idem*, p. 795.

21. *Revue Générale de Droit International Public* (1894) I, 44-45.

(b.) *Case of Pelletier*

Another case cited in the Nicaraguan Brief (p. 4) is that of the arbitral award rendered by the Honorable William Strong in June, 1895, on the claim of the American citizen, Antonio Pelletier, against the government of Haiti. The Brief is in error in saying that the arbitrator was "then a justice of the Supreme Court of the United States." He had, before he became arbitrator in the case, ceased to be a member of the Supreme Court, having availed himself of the provision for the retirement of judges of the Court on attaining the age of seventy years. It is, however, superfluous to remark that the age of the honorable arbitrator would not have affected the validity of his award, if it had been sustained either by the facts or by the law. But there is nothing in the case from beginning to end that lends the slightest countenance to the Nicaraguan contentions.

Being indisposed to argue the present case in a parsimonious spirit, I will state a fact not mentioned in the Brief for Nicaragua, and that is, that the protocol between the United States and Haiti of May 24, 1884, in which the case of Pelletier was decided, embraced another claim, known as that of Lazare; that the honorable arbitrator decided in favor of the United States in both cases, but that in neither case did the United States afterwards enforce the award. In the case of Lazare, indeed, the United States acted not only upon the results of its own investigations, which disclosed remarkable irregularities and assumptions of power, but also upon the request of the arbitrator, who declared that he was "clearly of the opinion that the award ought to be opened."²² In the case of Pelletier, the United States, on examining the award, found not only that it was glaringly unjust but that it resulted from a flagrant misapprehension of the very terms of the protocol. The question involved in this case was whether the claimant had been wrongfully tried and imprisoned in Haiti in 1861 on a charge of "piracy and attempt at slave trading." The protocol provided that this question should be determined "according to the rules of international law existing at the time of the transactions complained of."

As is well known, there are two kinds of "piracy," piracy by law of nations and piracy by municipal law. Piracy by law of nations has never been understood to include the slave-trade. It applies, in the main, to marauding on the high seas; and as this constitutes a menace to all nations, visit and search have, by common consent, immemorially been employed for its sup-

22. Moore, *International Arbitrations*, II, 1804.

pression, in peace and in war. But this measure has not been extended to the suppression of the various offences, including slave-trading, which, although declared by municipal law to be piracy, do not constitute piracy as understood in international law.

Early in the nineteenth century an effort was made to assimilate the African slave-trade to piracy by law of nations, in order that visit and search might be employed for its suppression. Conventions to that effect were signed between various powers, including the United States; and in the expectation that they would come into force, the United States on May 15, 1820, passed an act, which was eventually incorporated into the Revised Statutes, declaring slave-trading to be piracy and to be punishable with death. Owing, however, to the opposition to any extension of visit and search, the international movement to deal with slave-trading as piracy by law of nations did not succeed. The conventions failed, and as a result there were left on the statute books of various countries, including the United States, laws describing and punishing slave-trading as piracy. Haiti naturally had similar laws. It was held by Sir William Scott in the case of the *Louis*,²³ that, outside the national jurisdiction, such laws could operate only on the ships and citizens of the powers by which they were passed; and this decision was followed by the Supreme Court of the United States in the *Antelope*.²⁴ But it never was doubted that they might, like other national laws, be enforced within the national jurisdiction on all ships and all persons there attempting to violate them.

By some strange misconception, the arbitrator in the case of Pelletier interpreted his obligation to decide the claim "according to the rules of international law existing at the time of the transactions complained of," as meaning that he must decide whether the acts, for which Pelletier was tried and imprisoned in Haiti, constituted in 1861 piracy by law of nations. In reality no such question was submitted to him. The protocol nowhere even remotely suggests it. Nevertheless, the venerable arbitrator declared that he was restricted to the decision of that sole question, and, protesting his profound regret that he was so constrained, made an award of damages to the claimant, who, as he expressly found, had committed in Haitian waters an act which was described and punished under Haitian law as piracy, namely, the attempt to seize and carry away Haitians into slavery. Commenting on this fact,

23. 2 Dodson, 238.

24. 10 Wheaton, 66, 116-123.

Mr. Bayard, who was then Secretary of State, in a report to the President, on which the latter acted, said:

I cannot presume that the Government of the United States, by stipulating that the decision of the Pelletier claim be made according to the rules of international law existing in 1861, intended to deny to Haiti the right at that time to execute within her own territorial jurisdiction her laws against slave-trading or piracy therein committed, and I am compelled to declare that had such been this government's expressed intention, I could not recommend that it should now be executed in the light of the facts developed in the arbitration.

It was especially with reference to the arbitrator's singular ruling on this point that the President of the United States made the perfectly proper and correct declaration quoted in the Brief for Nicaragua. But, again, neither the declaration of the President nor his refusal to enforce the award gives the slightest support to the Nicaraguan contentions. The circumstances simply are that the government of Haiti laid before the government of the United States, in whose favor the awards had been rendered, certain objections to their enforcement; the government of the United States examined these objections, and, having reached the conclusions that they were well founded, in an honorable spirit of fair-dealing refused to claim the benefits of the awards, which were cast aside and abandoned by mutual consent.²⁵

(c) *Cerruti Case*

In the Brief for Nicaragua references are repeatedly made to an opinion given by Signor Pierantoni, in which that eminent Italian publicist maintained the nullity of Article V of the award which the President of the United States, Mr. Cleveland, on March 2, 1897, in the last hours of his second Administration, rendered under the protocol of August 18, 1894, between the Kingdom of Italy and the Republic of Colombia, on the claim of the Italian subject, Cerruti, against the latter Government. I will particularly examine this opinion, not only because it is directly cited in the Brief for Nicaragua, but also because it is the source of many other citations therein made. Much that the learned publicist says is of a general nature and does not require particular comment, although, as I shall hereafter point out, he does not avoid the repetition of certain erroneous statements which also occur in various other writers.

As regards his direct opinion on the Cerruti case, it may be observed that many of Signor Pierantoni's comments on the "uncertainties" of President Cleveland's award were not actu-

25. Moore, *op. cit.*, II, 1800.

ally applied by him, since he stated that he was "prevented from expressing an accurate judgment on this point owing to the lack of information as to facts."²⁶ He held, however, that the award, so far as concerned its 5th Article, was null for "*substantial error*," in that the arbitrator had gone clearly outside his command and had expressly asserted full power, authority and jurisdiction to do what the protocol expressly forbade to be done.

The protocol provided that the arbitrator, as soon as he had accepted the office, should "become vested with full power, authority and jurisdiction to do and perform, and to cause to be done and performed, all things without any limitation whatsoever, which in his judgment may be necessary or conducive to the attainment in a fair and equitable manner of the ends and purposes which this agreement is intended to secure"; that he should "*thereupon* proceed to examine and decide according to the documents and evidence . . . and the principles of public law, first, which, if any, among the said claims of Sig. E. Cerruti against the Government of Colombia, *be a proper claim or claims for international adjudication*, and, secondly, which, if any, of the said claims of Sig. E. Cerruti against the Government of Colombia, *be a proper claim or claims for adjudication by the territorial courts of Colombia*." As to the *first* class, the arbitrator was to determine and declare "the amount of indemnity, if any, which the claimant, Sig. E. Cerruti, be entitled to receive from the Government of Colombia through diplomatic action"; and, as to claims which the arbitrator was to declare to belong to the *second* class, he was to "take no further action." The two governments agreed to treat the arbitrator's decisions as "final and conclusive, and not subject either to discussion or appeal"; and they further agreed "not to reopen negotiations or diplomatic discussions on any point or points which the arbitrator may decide or dispose of, or which he may declare to have already been disposed of in conformity with public law, *nor upon any claim or claims of Sig. E. Cerruti which the arbitrator may declare to have an internal and territorial character*."

In his award, which was given at Washington on March 2, 1897, the arbitrator, while disallowing certain claims, held that others were "proper claims for international adjudication," and on the latter awarded a certain sum, with interest, as indemnity. This, as Colombia claimed, exhausted the arbitrator's powers; but, in the 5th paragraph of his award, he proceeded, on the one hand, to adjudge and award to the

Colombian Government "all rights, legal and equitable," of the claimant "in and to all property, real, personal and mixed, in the Department of Cauca," which had been called into question in the proceeding, and, on the other hand, to adjudge and award that the Colombian Government should "guarantee and protect" the claimant "against any and all liability" on account of various copartnership debts, and to "reimburse" him to the extent to which he might be legally compelled to pay such debts, together with all expenses incidental to contesting them. All this was avowedly done by the arbitrator under the clause in the protocol investing him with full power, authority and jurisdiction to do and cause to be done whatever might in his judgment be necessary or conducive to the attainment in a fair and equitable manner of the ends and purposes which the protocol was intended to secure. Whether this stipulation was intended to go beyond the regulation of procedure, is a question fairly open to argument; but Colombia claimed that it certainly was not intended to override the subsequent stipulations which, while directing that indemnity be awarded on claims found to be proper for "international adjudication," with equal explicitness directed that "no further action" should be taken upon the claims found to be proper for "adjudication by the territorial courts of Colombia." In reality, exchanges were ordered of private property for private debts, and the Colombian Government was sentenced to guarantee and reimburse to the claimant the expenses of any resulting litigation in the territorial courts of Colombia.

The diplomatic representative of Colombia at Washington did not wait six years or even six days to contest the validity of the award, but on March 3, 1897, the day on which he received the sentence, addressed to the Secretary of State a protest against it on the ground that it neither fulfilled the conditions nor observed the limitations of the protocol. In particular, the Colombian representative protested against the 5th paragraph as involving a delegation to others of the authority of the arbitrator to determine and declare the amount of the indemnity due by Colombia to the claimant, besides leaving it to "some other persons and tribunals," neither named in the protocol nor specified in the award, at times and in modes undefined and unauthorized, to determine "the amounts and conditions of further liability, of Colombia to the claimant, by reason of claims submitted to the arbitrator." The immediate protest of the Colombian diplomatic representative at Washington was promptly adopted and renewed by his government. An appeal was made to the President of the United States to reconsider the award, but President Cleveland's suc-

cessor, President McKinley, held that the President of the United States had, by the rendition of the award of March 2, 1897, become *functus officio* so far as the protocol was concerned, and that he could not act unless "a joint request for a new arbitral proceeding be made by the parties to the original arbitration."²⁷

The Italian Government subsequently requested the President to interpret the provisions of the 4th paragraph of the award as to the manner of payment and the computation of the amount due thereunder. President McKinley, while reaffirming the view that the arbitral function of the President of the United States was discharged by the rendition of the award, pointed out, "as the impartial friend of both the disputants, the superior importance of the controversy" as to the 5th paragraph over that as to the 4th, and stated that, as Italy insisted upon the execution of the award "pure and simple, in all its parts," while Colombia denied the validity of the 5th Article, it would, even if there were no other objection, be undesirable to take an "imperfect step toward the settlement of the controversies between the two governments of Colombia and Italy, which would not even palliate their essential cause of difference;" and he added that motives of delicacy "would necessarily lead him to refrain from putting forth any suggestion that the parties enlarge the request already made." An identic note to this effect was addressed to the diplomatic representatives of Italy and Colombia.²⁸

There the correspondence ended. The case is wholly unlike that which is set forth in the Brief for Nicaragua.

(d) *Orinoco Case*

Much space is devoted in the Nicaraguan Brief (pp. 75-80, 88) to the case of the Orinoco Steamship Company against Venezuela. By way of prelude, a passage is quoted from a speech by Senhor Ruy Barbosa at the Second Hague Conference, advocating the adoption of some provision for the revision of arbitral awards, while the account of the case itself is largely composed of quotations from arguments and public addresses of counsel for the claimant company. These arguments and addresses are no doubt characterized by ability and skill; but, as they largely represent what their distinguished authors desired the tribunal to do, or thought it should have done, rather than what the tribunal actually did, I will endeavor to indicate, as briefly as possible, the nature, the course and the results of the litigation.

27. Cerruti Document, pp. 17-18.

28. *Idem*, pp. 51-57.

The claim was first referred to a mixed commission under a protocol between the United States and Venezuela, signed February 17, 1903; and a decision was rendered on February 22, 1904, by Mr. Barge, the umpire. He awarded \$28,224.93, and rejected all other items of the claim, which amounted to more than a million dollars. The United States demanded a revision of this award. The grounds on which the demand was made were set forth in an instruction of Mr. Root, Secretary of State, to Mr. Russell, American Minister at Caracas, of February 28, 1907, in which there is the following passage: It is a re-examination of this award before an impartial and competent tribunal that the claimant now asks. To this reasonable request . . . the Venezuelan Government sets up as a bar the fact that this decision of the American-Venezuela Mixed Claims Commission is final, and that to reopen a decision of a court of arbitration would be to disregard the finality of such decision. To this there is an obvious and very reasonable reply, namely, that a decree of a court of arbitration is only final, provided the court acts within the terms of the protocol establishing the jurisdiction of the court, and that a disregard of such terms necessarily deprives the decision of any claim of finality . . . In view, therefore, of the circumstances of the case, and the express violations of the terms of the protocol or errors in the final award, arising through gross error of law and fact, and in the light of the history of both nations in the matter of arbitral awards, *this government insists upon and confidently expects a reopening and a resubmission of the entire case of the Orinoco Steamship Company to an impartial and a competent tribunal.*²⁹

The Venezuelan Government having declined this request, a protocol was eventually concluded on February 13, 1909, for the reference of the dispute to the permanent tribunal of arbitration at The Hague. The terms of the submission were as follows:

The arbitral tribunal shall first decide whether the decision of Umpire Barge, in this case, in view of all the circumstances and under the principles of international law, is not void, and whether it must be considered to be so conclusive as to preclude a reexamination of the case on its merits. If the arbitral tribunal decides that said decision must be considered final, the case will be considered by the United States of America as closed; but, on the other hand, if the arbitral tribunal decides that said decision of Umpire Barge should not be considered as final, the said tribunal shall then hear, examine and determine the case and render its decisions on its merits.

The total amount of the claim was \$1,209,701.04. The tribunal, consisting of Messrs. Gonzalo de Quesada, Cuban min-

29. Case of the United States, II, Appendix, 779, 783.

ister at Berlin; H. Lammasch, of the University of Vienna, and A. Beernaert, minister of state of Belgium, allowed, in addition to the \$28,224.93 awarded by Mr. Barge, four items, amounting to \$57,412.59, together with \$7,000 for counsel fees, instead of \$25,000 claimed by counsel, and rejected the rest of the claims.

The award of the arbitrators is a noteworthy document and contains numerous significant passages. It first remarks upon the fact that by the terms of the protocol of 1903, under which the decision of the umpire of the mixed commission was rendered, that decision was to be "final and conclusive;" but says that the parties to the agreement for a rehearing had "at least implicitly admitted, as vices involving the nullity of an arbitral decision, excessive exercise of jurisdiction and essential error in the judgment." The tribunal kept strictly within this mandate; indeed, it altogether refrained from going into the question of "essential error," and held that "the circumstances that the umpire, although he might have based his award on the interpretation of the contracts," had "invoked other subsidiary reasons, of a rather more technical nature, cannot vitiate his decisions." Hence, although the agreement provided that the tribunal, if it should find that the Barge decision was not "final," should "then hear, examine, and determine the case and render its decision on the merits," it declined to go into the merits of all the claims, but confined its award to those in respect of which the umpire seemed to have committed an excess of power through "misinterpreting the express terms of the agreement" under which he sat. Into the merits of the other claims the tribunal refused to go, declaring that "when an arbitral award embraces several independent claims, and consequently several decisions, the nullity of one is without influence on any of the others, more especially when, as in the present case, the integrity and the good faith of the arbitrator are not questioned." The tribunal assigned, in addition, the following significant reasons:

Whereas the appreciation of the facts of the case and the interpretation of the documents were within the competence of the umpire, and as his decisions, when based on such interpretation, are not subject to revision by this tribunal, whose duty it is, not to say if the case has been well or ill judged, but whether the award must be annulled; that if an arbitral decision could be disputed on the ground of erroneous appreciation, appeal and revision, which the conventions of The Hague of 1899 and 1907 made it their object to avert, would be the general rule.

The tribunal so ruled, in spite of the fact, that as the agent of the United States tells us, it was "strenuously contended by

the United States" that, the moment the award was held not to be final, "both the letter and the spirit of the protocol required an examination of the entire case on its merits"; and he also assures us that the agent of Venezuela did not dissent from this contention. But the tribunal could not be moved.

Finally, the tribunal, it is to be observed, did not overlook the opportunity to express itself on the subject of the sanctity of arbitral awards and to call attention to the fact that The Hague conventions had made no provision for the reconsideration of such awards, the tribunal in this relation saying:

Whereas it is assuredly in the interest of peace and the development of the institution of international arbitration, so essential to the well-being of nations, that on principle such a decision be accepted, respected and carried out by the parties without any reservation, as it is laid down in article 81 of the Convention for the Pacific Settlement of International Disputes of October 18, 1907; and besides no jurisdiction whatever has been instituted for reconsidering similar decisions.³⁰

There is small comfort in this case for those who advocate the reopening of arbitral decisions, and the retrial of cases on the merits, resulting in "new" arbitral awards. In spite of the breadth of the submission under the protocol of 1909, the United States in the end failed to obtain the "reopening" of the "entire case," the tribunal limiting itself, for the impressive reasons which it set forth, to the reconsideration of items which it found that the umpire under the protocol of 1903 had, through a misinterpretation of its terms, ruled out.

(e) *Erroneous Citations: Alabama Case; Halifax Award*

The Brief for Nicaragua (p. 72) says: "In the famous *Alabama* arbitration at Geneva, the right of the parties to *set up and prove* overstepping of power *after the rendition of the award* was confirmed."

Again (p. 88) the Brief declares that in the *Alabama* case "the right was recognized in the parties to set up and prove overstepping of power after the award had been rendered and *notwithstanding the participation of the parties in the proceedings.*"

In connection with this supposed precedent, which, unlike those previously invoked, seems, as it is stated, to be specially apposite to the present contentions of Nicaragua, the Brief cites Lamoens, Pierantoni, and Mr. Luis Anderson's *El Laudo Loubet*.

The citations may be justified by the secondary sources to

30. *Foreign Relations of the United States*, 1911, p. 749; *American Journal of International Law* (1911), p. 44.

which the Brief appeals. Pierantoni says: "The celebrated Alabama arbitration at Geneva affirms the right of the parties to deduce and prove the excess of power after the award has been rendered." Mr. Anderson is no less explicit.

Nevertheless, the statements are absolutely unfounded. *No such precedent exists.* The error of Pierantoni is all the more remarkable, since he states that he once wrote a book on the subject. It is possible that, if he had re-read his own book, he would not have stated, in his opinion on the Cerruti award, that, in the case of the Geneva arbitration, "all the writers" and the leading journals of the civilized nations recognized "the right to deduce the excess of power after award was made."

If this be so, I can only say—so much the worse for the writers and the journalists. The simple facts, with which, as the historian of the Geneva Arbitration, I am somewhat familiar, are that, after the Cases or Statements of the parties were exchanged, but before the tribunal of arbitration assembled, the British Government advanced the contention that the claim for compensation for *indirect* losses, which was included in the Case of the United States, had been renounced by the representatives of the United States during the negotiations and was even excluded by the terms of the treaty. The American negotiators denied that they had made such a renunciation, while the Government of the United States denied that any renunciation of the claim was to be found in the terms of the treaty; but the United States contended that, so far as concerned the terms of the treaty, the question was one to be submitted to the arbitrators. It is evident that the fundamental question at issue was that of the power of the arbitrators to determine their own jurisdiction. While the controversy was proceeding, the tribunal assembled at Geneva, whereupon the president of the tribunal, on behalf of all the arbitrators, including the arbitrator of the United States, declared that, without intending "to express or imply any opinion" upon the point of difference "as to the interpretation or effect of the treaty," they had "arrived, individually and collectively," at the conclusion that the "indirect" claims did not constitute upon principles of international law a good foundation for an award and should therefore be excluded from consideration, even if there were no disagreement between the two governments as to the competency of the tribunal to decide upon them. This declaration, which was accepted by both governments, ended the controversy. The declaration was made on June 19, 1872; and it was on June 27th—eight days later—that the British argument was filed. The hearing then

began, and the award of the tribunal was rendered on September 14, 1872. This simple narration of the facts suffices to show how destitute of even a shadow of justification is the citation of the celebrated *Alabama* arbitration as an example of proof of excess of power after the award was rendered.

In reality, no allegation of excess of power on the part of the tribunal was made either after or before the award was rendered. The full amount of the award was paid, promptly and without question. A facsimile of the single coin certificate, with which the payment was made, may readily be seen.³¹

Another example sometimes given of the refusal to execute an award is that of the Halifax Commission of 1877. Rivier, for instance, states that the Halifax award, which was rendered on Nov. 23, 1877, *was not accepted by the United States*, on the pretext that the arbitrators' decision was not unanimous.³² The impression thus given is entirely erroneous. The treaty of May 8, 1871, under which the arbitration was held, provided for four distinct boards of arbitration, to deal with different matters. In the case of three of these boards, it was expressly stipulated that the vote of a majority should suffice for an award. On this point, the treaty, in the case of the Halifax Commission, was silent. The award, rendered in 1877, was made and signed by only two of the three arbitrators, the arbitrator on the part of the United States declining to concur in it and filing, separately, a dissent in which he questioned the competency of the board to make an award except by unanimous consent. Wholly apart from this question, the United States maintained that the award could not be supported on grounds within the jurisdiction of the commission and that it was essentially unjust. The United States submitted these contentions to the British Government, and at the same time argued that, because of the silence of the treaty, for which it was said there were special reasons, the vote of the majority was not sufficient. The British Government declining to concur in these contentions, the United States punctually performed the award, handing over, on the day it was due, a draft for the entire amount awarded (\$5,500,000), and declaring that it desired "*to place the maintenance of good faith in treaties and the security and value of arbitration between nations above all questions in its relations with Her Britannic Majesty's Government as with all governments.*"³³

31. Moore, *International Arbitrations*, I, 664.

32. *Droit de Gens*, II, 186.

33. *Foreign Relations of the United States*, 1878, pp. 316, 334; Moore, *op. cit.*, I, 745-753.

3. *Fraud*

The resolution of the Institute of International Law speaks of proved corruption on the part of the arbitrator.

An award is null, says Calvo, "when the arbitrators or one of the adverse parties did not act in good faith; if, for example, it can be shown that the arbitrators allowed themselves to be corrupted or bought by one of the parties."³⁴

To the same effect is Woolsey, who says the award is null, "if any of them [the arbitrators] were guilty of fraud";³⁵ Rivier, who speaks of an arbitrator who "allowed himself to be corrupted";³⁶ Bluntschli, who specifies "unfaithfulness . . . on the part of the arbitrators";³⁷ Heffter, who mentions the case of an arbitrator who "did not act in good faith";³⁸ Bonfils, who condemns a sentence which is "the result of the fraud or the faithlessness of the arbitrator."³⁹ Likewise, Wildman pronounces an award null when it was "made in collusion with one of the parties";⁴⁰ Twiss, when it was "the manifest result of fraud and collusion with one of the parties";⁴¹ Hall, when it "is proved to have been sustained by fraud and corruption";⁴² and Oppenheim, when the arbitrators have been "bribed."⁴³ Vattel speaks of "corruption" as a ground of nullity.⁴⁴ Oppenheim also mentions, as a ground of nullity, the use of "coercion" upon an arbitrator.⁴⁵

Mérignhac, referring to the case of corruption or of bad faith on the part of arbitrators, says:

332.—The arbitral sentence is null when it is established that one or more arbitrators were bought by one party, or that they acted in bad faith, by letting themselves be influenced by a pecuniary or other interest which they had in the cause. To these cases of corruption or of bad faith, it is necessary to add that, where the international arbitrator should be placed in a situation which M. Calvo defines as "a situation of absolute or relative legal or moral incapacity, for example, if he was bound by previous engagements." The agreements sometimes are explicit in these latter points: thus

34. *Le Droit International*, III, §1774, 485-486.

35. *International Law* (ed. 1883), p. 405.

36. *Principes du Droit des Gens*, II, 185.

37. *Le Droit International Codifié* (5th ed. Paris, 1895), p. 281.

38. *Le Droit International* (Bergson ed. by Geffcken, Paris, 1883), §109, p. 240.

39. *Manuel de Droit International* (Paris, 1901), §955, p. 532.

40. *Institutes of International Law*, I, 186.

41. *Law of Nations*, II, 7-8.

42. *International Law* (5th ed.), p. 363.

43. *International Law*, II, 18, 27.

44. *Law of Nations*, Bk. 2, chap. xviii, §329.

45. *International Law*, II, 18, 27.

article 6 of the Treaty of 1794, between England and the United States, contained the following provision: "The commissioners swear to forbear to exercise their functions in any case in which they may be personally interested." As to the acts of corruption or of bad faith on the part of arbitrators, and of such a nature as to bring about the nullity of the sentence, they are happily almost unknown in the practice of international arbitration, and it is necessary to go far back in order to find an example. Barbeyrac cites the case of the Emperor Maximilian and of the Doge of Venice, who reciprocally tried to corrupt the pope Leo X, chosen as arbitrator of their differences. We do not encounter any other act of this nature reported by the authors.⁴⁶

I have given these numerous citations for the purpose of showing the character of the charges that must be made and proved in order to invalidate an award on the ground of the misconduct of an arbitrator.

But, fraud may also be alleged to have been committed by a party or by a claimant.

Heffter declares that an arbitral decision may be attacked if the party in whose favor it was rendered "did not act in good faith."⁴⁷

Fiore condemns as null an award "obtained by deceit."⁴⁸

Corsi, the author of a well known Italian work on International Arbitration, assigns, as one of the grounds for reviewing an award, "falsification of the documents or proofs on which the decision is expressly founded, provided that the party who alleges the falsification of these means of information did not have knowledge of it during the argument, and that it has been declared by an authority whose competence is not or cannot be contested, according to the principles of the common law, by one of the parties to the case."⁴⁹

In this relation the Brief for Nicaragua (p. 5) cites the case of "La Abra Silver Mining Company," which, says the Brief, was "submitted for new arbitration under an agreement between the two states;" and at this point the Brief cites Mérignhac, in the *Revue de Droit International*, "Volume IV, 1882, page 39." Nothing by Mérignhac is there found. The citation is inaccurately made, but this is not material. More than ten years later than the date indicated, Mérignhac fully dealt with the subject, and repeated what he previously said; and it appears that what he actually proposed was that, if a case was to be reheard on allegations of nullity, "notably those

46. *Traité de l'Arbitrage International*, p. 314.

47. *Le Droit International* (Bergson ed. by Geffcken, 1883), §109, p. 240.

48. *Nouveau Droit International Public* (Paris, 1885), II, 642.

49. *Revue Générale de Droit International Public*, VI, 27.

based on excess of power, the corruption or bad faith of certain arbitrators, or error of law," it should be referred to "another tribunal," and not to the old one, since the latter would "necessarily be influenced by the decision which it had rendered." In support of this view, Mérignhac cites Rolin-Jaequemyns, who, says Mérignhac, thought that, if this practice were generally provided for in arbitral agreements, it would open the way to the establishment of a permanent superior tribunal.⁵⁰ But, be this as it may, since the parties, in the present state of things, remain, says Mérignhac, "by the force of things, judges of the various points, we do not go too far in advising them to exercise the greatest prudence in the acceptance of causes of nullity of the sentence. It is only when they are absolutely sure of their existence, that they should invoke them; to act otherwise, would be to invalidate the authority of the institution of arbitration and to expose oneself also to a *casus belli* on the part of the adversary."⁵¹

But, in fact, the case of La Abra Silver Mining Company never was submitted to a "new arbitration," nor does Mérignhac say that it was. The fact is just the reverse. La Abra case is to be considered in connection with the Weil case. In these cases awards aggregating more than a million dollars were made in favor of the claimants by Sir Edward Thornton, umpire of the mixed commission under the convention between the United States and Mexico of July 4, 1868. Subsequently, the agent of Mexico presented a motion for a rehearing, in which he alleged that the awards were obtained by fraud and false swearing. The umpire declined to reopen the case on the ground, among others, that the provisions of the convention debarred him from rehearing cases which he had already decided, but at the same time intimated a doubt that either government would insist upon the payment of claims shown to be founded on perjury. In 1878 an act was passed by Congress to authorize the Secretary of State to distribute the moneys paid by Mexico under the convention. By this act the President of the United States was requested to investigate the charges of fraud in the cases of La Abra and Weil, and if he should be of the opinion that "the honor of the United States, the principles of public law or considerations of justice and equity," required that the awards should be reopened and the cases retried, he was authorized to withhold payment of the awards pending the retrial. In 1879 the Secretary of State of the United States, after examining all the proofs of fraud and perjury, made a report to the President, declaring that the

50. *Traité de l'Arbitrage International*, §350, pp. 329-330.

51. *Idem*, §338, p. 318.

honor of the United States required a further investigation of both cases. An attempt was made to pass a bill to refer the cases to the Court of Claims; but in 1882, a convention between the United States and Mexico was signed at Washington to provide for a rehearing before an arbitrator. This convention the Senate, desirous to maintain the principle of finality, declined to approve, and eventually both cases were, by act of Congress, referred to the Court of Claims. This Court found that the awards in both cases were obtained by false and fraudulent testimony, and its judgment was afterwards affirmed on appeal by the Supreme Court of the United States. But the point now of special interest is the fact that the obligations of the convention of 1868 were meanwhile faithfully performed by Mexico, all the instalments on the contested awards being paid over as they fell due. This precedent, if it stood alone, would be fatal to the contentions of Nicaragua. After the decision of the Supreme Court, the United States returned to Mexico all the moneys that had been paid on the awards, including the amount of certain early instalments which had been distributed among the claimants. It was not the protesting government, Mexico, that suspended the execution of the awards; *nor was the execution of the awards, as between the two governments, ever suspended.* But in the end, the United States, in whose favor the awards were made, voluntarily relinquished all benefits under them, and they were thus set aside by mutual consent.

4. *Essential Error*

With regard to this ground of "nullity," Mérignhac well says:

333.—The term "essential error" employed by the Institute is vague; shall the error in question be one of law or of fact, and, besides, how are we to know that it is essential? We must take account of the fact that opinions will necessarily vary in large measure; and that such a formula consequently carries in it germs of discord all the more dangerous that they may be easily transformed into causes of war! On the other hand, the question whether a sentence rendered by private arbitrators gives rise to an appeal on the ground of error, has been resolved in different ways in positive legislation; nevertheless, as a solution of principle which we accept in this regard, it appears that in private law recourse may be taken before an official jurisdiction placed above the arbitrator, and which will determine upon the assignment of error. But, this jurisdiction which would be charged with judging the error committed by the arbitrator, does not exist, as we know, in the international domain, unless the parties took care to provide for it and to organize it in the agreement. In the actual state of things, the parties would them-

selves be judges of the error invoked, and thus of the validity of the sentence. But, if it is a case in which we could surely affirm that the law was violated, or that the facts were badly appreciated, these cases would constitute the great exception; usually, on the contrary, the question will be doubtful and delicate. To admit that the losing party shall absolutely decide this point, is to place the arbitration at his discretion and to destroy (*dénaturer*) its obligatory character.⁵²

Corsi assigns as a capital defect an "error of fact, provided that the sentence be expressly founded on the existence or on the absence of an act or of a fact whose existence or absence was not observed before the tribunal, or could not be proved, while, after the publication of the decree, they succeed in giving such proofs of it as all the parties must admit to be decisive."⁵³

Oppenheim states that "if one of the parties has intentionally and maliciously led the arbitrator into an essential material error, the arbitral verdict has no force whatever."⁵⁴

Pradier-Fodéré, referring to Vattel's statement that, if the injustice is of small consequence, it should be endured in the interest of peace, says:

It is equally for the interest of peace that it is necessary to decide that a State should not refuse to execute an arbitral sentence simply on the ground that it is erroneous (unless it invokes an essential error which affects the principal object of the agreement and furnished the reason for the decision), that it is even contrary to equity (each party viewing equity from the point of view of its own interest), and still less that it is prejudicial to it. If it were otherwise, the parties who have had recourse to Arbitration, in order to resolve pacifically a difference existing between them, would never reach a definitive solution and the end of arbitration would not be attained.⁵⁵

Fiore holds that the error must relate to the "principal object of the agreement and which therefore constituted the ground of the decision."⁵⁶ And it may here be remarked that he warmly repels an interpretation put by Mérignhac on one of his statements, to the effect that he had proposed to reject an arbitral sentence whose character should be "equivocal."

We hold [says Fiore] that the arbitral award must be null and void if it implies a *manifest* contradiction in its dispositive part, that is to say, if the tribunal has ordered something altogether con-

52. *Idem*, p. 314.

53. *Revue Générale de Droit International Public*, VI (1889), 27.

54. *International Law*, II, 18, 27.

55. *Droit International Public*, VI, 436-437; citing to the same effect the French translation of Barbeyrac's ed. of Pufendorf, Liv. V, chap. xiii, §4, II, 175.

56. Antoine ed., II, §1215.

trary to another thing equally ordered by it, thus constituting a contradictory dispositive. We do not understand how Mérignhac in his estimable work on Arbitration, attributed to us an opinion which we have never held; . . . but, in criticizing me, he forgets to cite the page of my work where I express the opinion which he gratuitously imputes to me.⁵⁷

The sentence, once given, is [says Phillimore] binding upon the parties whose own act has created the jurisdiction over them. The extreme case may indeed be supposed of a sentence bearing upon its face glaring partiality, and attended with circumstances of such evident injustice as to be null. "Nec tamen" (Voet observes) "executioni danda erit, si per sordes, aut per manifestam gratiam vel inimicitiam probetur lata." But for such exceptions no rules can be safely laid down.⁵⁸

Twiss states that the decision is not binding if it is "in absolute conflict with the rules of justice, and therefore incapable of being the subject of a valid international compact."⁵⁹

Hall declares that an arbitral decision may be disregarded, "when the tribunal is guilty of an open denial of justice."⁶⁰

Heffter affirms that the arbitral decision may be attacked "if its provisions are contrary in an absolute manner to the rules of justice and consequently cannot form the subject of a convention;" but he adds that "simple errors," when not "the result of a partial spirit, do not constitute a cause of nullity."

An arbitral sentence, says Calvo, is null, when its tenor

is absolutely contrary to the rules of justice and therefore, cannot be the object of an agreement, as in the case where the arbitrator, called to pronounce on the satisfaction which one state owes to another for an offense, should condemn the offender to a reparation which would injure his honor and his independence; or yet in the case where the arbitrator should have in view some advantage which he might draw from an unjust decision, and should be so powerful as not to fear the resentment of the parties who have submitted to his judgment the regulation of their claims in the dispute; such was the decision of the Roman people, when the Italian towns of Ardea and Aricium having submitted to its arbitration their contest on the subject of the sovereignty over a certain territory, the assembly of the Roman tribes adjudged to the Roman State the property of the contested territory. [But he adds] The decisions of arbitrators should not be attacked for a simple defect of form, under the pretext that it is erroneous, or contrary to equity, or *prejudicial to the interests of one of the parties*. Nevertheless,

57. *Le Droit International Codifié* (1911), p. 619.

58. *International Law* (3d. ed. 1885), III, 5.

59. *Law of Nations*, II, 7-8.

60. *International Law* (5th ed.) p. 363.

errors of calculation and also all proved errors of fact (*les erreurs de fait constatées*) may always be rectified.⁶¹

When the arbitral decision, says Riquelme is so notoriously unjust that it imposes upon one of the parties a greater burden than the other claimed should be imposed upon it, its execution may be resisted, because it never could be understood that, in entrusting a matter to the Arbitration of another party, it would be willing to accept a worse fate than the opposing party demanded.⁶²

This is quoted with approval by Olivart, *Tratado de Derecho Internacional*, III, 19-20.

Writers sometimes discuss under the head of "essential error," and sometimes under that of "excess of power," the "violation of fundamental rules of procedure" as a cause of "nullity." I will therefore indicate here what they mean by that phrase.

Bluntschli says that the arbitral decision may be considered null, "if the arbitrators refused to hear the parties or violated any other fundamental principles of procedure." In exposition of this rule, he adds:

Arbitrators, being clothed with functions quasi-judicial, must respect the fundamental principles of procedure. Their decision cannot be attacked for simple defects of form, but it will be null if they have violated, in a direct and evident manner, the general principles of procedure; if they have, for example, forbidden the parties to formulate their demands or to refute the pretensions of their adversary, the latter will not be bound to submit to a decision so arbitrary. Pierantoni, p. 94, is not of opinion that this latter condition is included of itself.⁶³

Fiore, as we have seen, thinks that the sentence must be "reasoned"; and that it is null, "if the forms specially stipulated in the agreement under penalty of nullity," or prescribed by the "common law" or resulting from the nature of the case, were not observed. Of what is intended by the latter phrases, the instances mentioned by Bluntschli may be considered as examples. They refer to fundamental things, not to the non-observance of matters of form or of methods or details which could hardly have affected the result.

Here it is proper to make certain closing observations concerning the discussion by writers of alleged grounds of "nullity." Mérignhac has ventured to characterize one of those grounds as "vague"; and the same characterization may be extended to many of the discussions of them. This quality no

61. Calvo, *Le Droit International* (5th ed. 1896), III, 485-486.

62. *Elementos de Derecho Público Internacional* (Madrid, 1849), I, 126.

63. Bluntschli, *Le Droit International Codifié* (5th ed. Paris, 1895), 281.

doubt may largely be ascribed to the fact that the discussions are for the most part wholly conjectural, emanating from the desire to round out or to develop symmetrically some *a priori* conception rather than from an effort to meet any conditions that actually exist. In reality, if there is one thing more than another by which the discussions, if one will pause to reflect upon them, are distinguished, it is the striking paucity of examples of the evils or vices which it is proposed to remedy. Occasionally some learned publicist, resting for a moment on his oars, has remarked upon the absence of any signs of actual jeopardy.

The actual results of international arbitration do not justify a feeling of solicitude lest the loyal performance of arbitral awards may work injustice. Experience has completely justified the principle of finality. In discussing instances of its relaxation, we lost sight of their extreme rarity. The cases of La Abra and Weil were 2 cases out of 2,015 before the Mexican Claims Commission. The New Granadian* Claims Commission (1857) tried 218 cases; the Spanish (1871), 140; the French (1880), 745; and the awards were duly carried out, with inestimable advantage to the countries directly concerned and to the world at large. These are only a few examples. Many others equally convincing might be given. But enough have been adduced to demonstrate the dangers with which international arbitration would immediately be menaced if arbitral awards were exposed to eager and hopeful attacks, on confused and captious grounds, by disappointed suitors.

III. NICARAGUAN ALLEGATION OF NULLITY

The attitude now assumed by Nicaragua towards the Award of the King of Spain appears not only to be unjustified by international law and practice but also to be at variance with the terms and the spirit of the convention. As declared in the preamble of that instrument, the object of the Contracting Parties was to end a "vexatious matter" (*enojoso asunto*) in a manner befitting brother peoples, neighbors and allies. To this end they invested their Mixed Commission with the most ample powers. Not only was it empowered to determine, as between public documents, which were of the "greater weight," and, when examining "charts, maps and other analogous documents," to prefer those which it should "deem to be most

* The MS from which the present transcript is taken, has this form. The work, prepared by Señor Policarpo Bonillas, representative of Honduras, entitled "LÍMITES entre HONDURAS Y NICARAGUA, etc.," containing a translation of the present opinion, has, as appears, quite properly, used the term "Nueva Granada" (p. 290).

reasonable and just," but, on failure of proof of ownership, the Commission was required to consult "maps of the two Republics and geographical documents, or *documents of any nature, whether public or private*, that may throw any light upon the question." Moreover, after such consultation and study, the Commission was to fix the boundaries "equitably," and, if it should deem it "advisable," was authorized to "make compensations and even fix indemnities" in order to establish "as far as possible" well marked natural boundaries (Art. II, pars. 5, 6, 7). It would be difficult to conceive of the bestowal of broader powers or of wider discretion for the attainment of the object in view.

It being foreseen that the Mixed Commission might be unable to agree, the Contracting Parties further provided that the point or points which the Commission should fail to decide should be referred to arbitration. It is evident that, in the event of such arbitration, the powers of decision conferred upon the Mixed Commission were to pass to the arbitrators, or the arbitrator, as the case might be. The "point or points of demarcation" not decided by the Mixed Commission were (Art. III) to be "submitted to the decision of a board of arbitration without appeal" (*al fallo de un arbitramento inapelable*), or, in a contingency described in the convention (Art. V), to the decision of the Government of Spain or of some other government; and to the arbitrators, or the arbitrator, as the case might be, the parties were required to present their "briefs, charts, maps and documents." In a word, the point or points in dispute were to be submitted in their entirety to the final tribunal for final determination. Even apart from the express stipulation (Art. VII) that "the arbitral decision rendered by a majority vote, whatsoever it may be, shall be held to be a perfect treaty, obligatory and perpetual between the High Contracting Parties and shall admit of no appeal whatsoever," all the provisions of the convention attest the fact that the Contracting Parties intended to end the differences as to their boundary, in a comprehensive manner, once and forever.

In spite of all this, and of the universal opinion of writers that arbitral awards, even in the absence of an express stipulation on the point, import finality, the Brief for Nicaragua (p. 104 *et seq.*) seeks to weaken the obligation of the award of the King of Spain by arguing that the Nicaraguan Government never "adopted" it; and in support of this view the Brief (p. 105) quotes Calvo saying that, whereas, in the public law of most countries, a judicial judgment obtained by an individual against the government requires "congressional and

executive action" to make it "effective," so "an *arbitral award* does not become *executory* except upon the *formal concurrence* of the *legislative with the executive power of the state* against which the judgment has been rendered."

Here the quotation ends. Probably a legal expert would not infer from it that Calvo intended to convey the inference that either the domestic judgment or the arbitral award would not be *obligatory* until supplementary legislative and executive action had rendered it "effective" or "executory." But we are not left to conjecture, for Calvo, immediately after the passage quoted in the Brief, goes on to say:

Then the case may present itself where these two powers refuse to execute the sentence; in this case, what shall be the duty of the interested State? There is no room to hesitate to reply that this non-performance of a formality, which is after all wholly personal, would not release it as regards the other party towards which it has contracted the obligations by the fact itself of the submission to arbitration, and still less withdraw it from the consequences of this mode of adjustment, that is to say, from the prescriptions of the sentence rendered against it. The decision of the arbitrators has for the parties the effects of a regular agreement; it binds them for the same reasons and under the same conditions as treaties; they are bound to execute it just as they would be by a treaty by which they had settled their respective rights as the arbitrators have done.

§1773. Moreover, the decision of an international tribunal, in the sphere of its authority, as Mr. Bancroft Davis, in his *Notes on the Treaties of the United States*, shows to be the constant practice of States, is conclusive and definitive without being susceptible of a new examination. It is not then, properly speaking, an approval, a ratification of the arbitral judgment that the sentenced government has to request from its legislative power, but rather, nay solely, the voting of the means of performing the engagements which such judgment imposes on it; as to the executive power, its task is limited to the employment of those means in the sense prescribed by the judgment.

That which took place in the English Parliament on the occasion of the arbitral sentence rendered against England in the difference with the United States on the subject of the "Alabama Claims" sufficiently exemplifies this point. We know that the member of the arbitral tribunal at Geneva chosen by the Queen of England, Sir Alexander Cockburn, refused to sign the decision rendered by his colleagues on September 14, 1872, for reasons of dissent which he set forth in a document deposited in the office of the tribunal at the moment when judgment was pronounced. As Mons. Rolin-Jaequemyns has observed, "with any one conversant with English public opinion, there would be no doubt that the negative opinion of Sir Alexander Cockburn expressed the sentiment of the majority of the Parliament and of the English people." Nevertheless, in the parliamentary debates on the sentence at Geneva, not the slightest

allusion was made to any right England would have had to refuse to execute it. Several speakers, it is true, criticised the conduct of the government and the terms of the agreement by which such a responsibility had been incurred; but no one emitted the thought that they have the right to withdraw from that responsibility. The discussions bore exclusively on the diplomacy of the government, but not at all on the validity in law and in fact of the arbitral judgment. In the presence of criticisms on the decision of the tribunal, Sir Alexander Cockburn nevertheless expressed the hope "that the English people would accept it with the submission and the respect which it owes to the decision of a tribunal to which it has freely consented to accept the judgment." What in fact took place was this: the payment of the indemnity was voted without division by the House of Commons, and two months later, the Queen, in pronouncing the close of the session, thanked the House for the liberality with which it had enabled her to satisfy the obligations which had been imposed on her by the arbitral sentence at Geneva.¹

The precise words of Her Britannic Majesty, in her speech on the closing of Parliament on August 5, 1873, were: "I am very sensible of the liberality with which you have provided for the various charges of the State, and have likewise enabled me promptly to meet the obligations imposed upon me by the award of the arbitrators at Geneva during the past year."²

Calvo also cites the Notes of Bancroft Davis on the treaties of the United States. From that source we may quote the following passage:

When a treaty requires a series of legislative enactments to take place after exchange of ratifications before it can become operative, *it will take effect as a national compact, on its being proclaimed*, but it cannot become operative as to the particular engagements until all the requisite legislation has taken place.

Where a treaty cannot be executed without the aid of an act of Congress, it is the duty of Congress to enact such laws. Congress has never failed to perform that duty.³

To the same effect is Halleck, who says:

Where the treaty is made and ratified by competent authority, with no express or implied limitations in the treaty-making power, it is considered to be obligatory upon the contracting parties, and it is the duty of the legislative power of the State to pass the laws, and to make the appropriations necessary to carry it into complete effect.⁴

1. *Confused Character of Allegations*

The more one studies the Brief for Nicaragua, the more he is forced to conclude that there is no single point in it, in

1. Calvo, *op. cit.*, pp. 483-485.

2. Hansard, *Parliamentary Debates; British and Foreign State Papers*, 1872-73, p. 4.

3. *Treaties and Conventions between the United States and Other Powers, 1776-1887* (Washington, 1889), p. 1228.

4. Halleck, *International Law* (4th ed. by Baker, London, 1908), I, 299.

which the representatives of that Government seem to feel entire, or indeed any particular, confidence. As each point is raised up, another is promptly rushed to its support, lest by inherent weakness it may fall. None is permitted to try to stand alone.

The Brief (p. 59) says that the preparatory commission, at its first session in Guatemala,

without even attempting to appoint a single member of the diplomatic corps as was made mandatory by the arbitral agreement, acceded by *common consent* to the appointment of a third arbitrator in the person of His Majesty the King of Spain, although it did set forth, in the act mentioned, the statement that the designation had been made after having taken the steps prescribed by Articles III and IV.

Those articles were not, so the Brief avers, complied with, since they "laid down textually" the obligation to proceed with "the selection of a member of the diplomatic corps until the membership thereof should have been exhausted," and further authorized the arbitrators "to designate a foreign or Central American public personage, *only*, however, in the event that the membership of the diplomatic corps should have been exhausted." The Brief calls this (p. 60) an "arbitrary determination," by which Article V was "ignored." It also charges that, in agreeing to request the Spanish monarch to accept the office "through the medium of his minister plenipotentiary," the arbitrators "stripped the contracting governments of the power reserved to them in Article X," which provided that they should "communicate the appointment to the respective Secretaries of Foreign Relations, and thus secure the acceptance of the appointee." The fact, says the Brief, "that the acceptance was not sought through the medium of the respective foreign offices would, nevertheless, suffice to invalidate the acts of that appointee." They thus "modified" the treaty, which they possessed no power to do. Moreover, says the Brief, even if the choice of His Majesty had been regularly made, he should have acted as third arbitrator in conjunction with the two nationals and not as sole arbitrator. His Majesty, the Brief affirms (p. 64), was thus "led into error"; but his courtesy induced him to accept the office, although, if he had been informed of the facts, it is to be presumed that "he would have made his excuses with equal courtesy." The Brief further charges that the arbitrators, in declaring it to be understood that he should be "exclusively endowed with the rights conferred" by the treaty, manifestly recognized the impossibility of securing his attendance at Guatemala City, and to meet the difficulty undertook to "delegate to him such powers as he

should need as sole arbitrator," all in violation of the treaty. The Brief further asserts (p. 69) that "the collective or tri-personal arbitration . . . was the sole entity, according to the treaty, that was legally competent to render an award;" and, following out this contention, the Brief declares (p. 80) it to be a "more essential point,"—more essential even than "the failure to observe the rules and prescriptions laid down by the parties" or "the conditions established as indispensable for the constitution of the arbitral tribunal"—that the award still "had to be rendered by a majority vote in conformity with the arbitral agreement, in order that that decision might have the character of a perfect, obligatory and perpetual agreement between the contracting parties, from which there could be no appeal whatsoever." The Brief at great length and with much repetition rings the changes in this "new and decisive reason for holding the royal award to be a nullity," declaring that the award rendered by the King "as such sole arbitrator and all his acts as such were absolutely null and void, even admitting for the purpose of agreement that his appointment as third arbitrator was valid." Farther on, the Brief (pp. 82–83) seems for a moment to admit that, if the two arbitrators had exhausted all efforts to appoint a third arbitrator, the process might have passed beyond the "tripersonal" stage; but it sedulously avoids a definite commitment on that point, and goes on to declare that, if the two arbitrators had exhausted all efforts to agree on a third arbitrator, the arbitration must, according to the treaty, "have been submitted to the decision of the foreign offices of the two signatory governments," whose "duty" it would have become, "on the happening of the event provided for in the organic law, *to lay down the basis of the arbitration and proceed to the election of the government which, by virtue of the disagreement of the two arbitrators, was to render a final award in the case.*" The "Nicaraguan and Honduran arbitrators were not," continues the Brief, "such representatives or plenipotentiaries of their respective countries as to entitle them to arrogate to themselves arbitral power sufficient to extend to the King, even assuming the validity of his appointment, a jurisdiction that would convert him into a sole arbitrator"; and the Brief further avers that, "in thus voluntarily surrendering their powers to the advantage of the King, they dissolved *ipso facto* and automatically the arbitral tribunal that had just been constituted and abrogated the treaty which was the fountainhead of that tribunal's jurisdiction and of their powers." Again, the Brief (p. 84) speaks of their action as a "delegation of authority," of (p. 86) "the imperative necessity of participation

of all the arbitrators and of a *majority vote* in every collective arbitration," of (p. 87) the "bestowal upon His Majesty of extraordinary powers to decide the question by himself and without the participation of the arbitrators of Nicaragua and Honduras," and (p. 88) of the "serious error" that "the royal arbitrator failed to take cognizance of the provision contained in the agreement to come to Guatemala."

Such are the Nicaraguan arguments for nullity; and it must be confessed that the manner of their presentation is somewhat baffling. Nowhere compactly stated, they glide in and out through many pages, appearing, disappearing and reappearing, with a swift and kaleidoscopic variety as brilliant as it is dazzling. The foregoing extracts have been impaled, in an anxious and laborious effort to ascertain the aliquot parts whose images have been so deftly multiplied. As a result, it is found that those parts, when finally isolated, are few in number. In effect, the contentions are (1) that the arbitrators of Honduras and Nicaragua failed to execute the provisions of Article V of the treaty in relation to the selection of a member of the Diplomatic Corps at Guatemala City as third arbitrator, (2) that, this being so, the proceeding never passed beyond the stage of "tripersonal" arbitration, and consequently that the King of Spain, even if he had been regularly appointed, must be considered as a third arbitrator and a member of the "tripersonal" tribunal, (3) that he consequently must have come to Guatemala City, and must there have participated in the majority vote, (4) that it is only to an award, resulting from such majority vote, that the treaty stipulation of finality applies, (5) that the two arbitrators, in "delegating" to the King of Spain the power to act as sole arbitrator, "abrogated" the treaty, and (6) that, even if this were not so, the award was rendered after the treaty expired.

It is evident that the Nicaraguan Brief, in taking the foregoing position, plays fast and loose with the alleged failure of the two arbitrators to execute the stipulations regarding the selection of a member of the Diplomatic Corps as third arbitrator. It may indeed be said that the Nicaraguan argument, when reduced to its final analysis, consists, with a single exception, solely of this one aliquot part, on which all that is said in regard to defects of procedure, the delegation of power, the necessity of the presence of the King of Spain at Guatemala City, and the requisite of a majority vote, is but a variation. We will at once proceed to clear away this underbrush.

2. *The Arbitrator*

When we come to consider the attacks made upon the reference of the dispute to the King of Spain, the first thing to be noticed is *the outstanding fact that the case was referred to the only arbitrator directly and specifically designated by the High Contracting Parties themselves in the treaty.* I say "directly and specifically designated," because, when the treaty said the "Government of Spain," law and common sense both tell us that the Executive Government, of which His Majesty the King was and is the head, was meant. The contracting parties and their agents all so interpreted the treaty, and they accordingly executed it in that sense. It was not "courtesy" on the part of His Majesty that induced him to act upon that interpretation. He would have exposed himself, no less than the contracting governments, to ridicule, if he had intimated that they had really agreed to take the Cortes, the Judiciary, the Army, the Navy, the Police Force, or some other branch of the Government as their arbitrator.

What ground, then, is there for saying that the submission of the case to His Majesty was illegal?

It is alleged that they should first have "exhausted" the membership of the Diplomatic Corps at Guatemala City for a "third arbitrator." It is admitted that the two arbitrators recited, in their official record, that they had "taken the steps" prescribed by Articles III and IV of the treaty; and no stress can properly be laid on the circumstance that they omitted specifically to mention Article V, not only because it is directly connected with the preceding Articles but also because they were evidently acting under it as well. That their record imports verity, and is conclusive as to the performance of what it sets forth, is a position sustained by the highest judicial authority. Thus, in a case in which an attempt was made to impeach the record of a trial justice, the Supreme Court of Massachusetts said: "The doctrine that a record imports absolute verity, and that no averment, plea or proof is admissible to the contrary, has been uniformly maintained from the earliest times, on grounds of public policy. It is too important and too well settled by authority to be questioned."⁵

But this is not all. The action of both governments was in conformity with the recital in the record. If their representatives misinterpreted their duty, or failed to perform it, it was open to them to say so. They must have known the

5. *Kelly v. Dresser*, 11 Allen, 31. See, to the same effect, *Waldron v. Palmer*, 104 Michigan, 556; *Taliaferro v. Pryor*, 2 Grattan (Va.), 277; *Cote v. New England Navigation Co.* (1912), 213 Massachusetts, 179.

facts, and it was their duty to know them. The award of the King of Spain recites that the case was submitted to him for decision "by virtue of Articles III, IV, and V," of the treaty. The contracting governments were in effect parties to that recital, for they joined in the submission, presented their proofs, and invoked the award. In these circumstances, to permit either of them now to repudiate its action would be to violate the fundamental principle which, as has abundantly been shown, forbids the impeachment of arbitral awards on antecedent grounds which the parties forbore to raise before the arbitrator. This principle obviously is founded on elementary considerations of good faith.

But, even if this were not the case, I should not hesitate to maintain that the belated interpretation which Nicaragua now seeks to impose upon the treaty is unreasonable and inadmissible. According to that interpretation, the membership of the Diplomatic Corps of Guatemala City must have been literally "exhausted," one by one, by specific and recorded solicitation, without regard to mental or moral qualifications, personal habits and attachments, or political connections. This is indeed a desperate contention. It is not sanctioned by the terms of the treaty. Before a lot could be drawn, under Article IV, names had to be "proposed by each party." This Clause, unless we are to ascribe to the contracting parties an unparalleled fatuity, evidently contemplated the exercise of a sound discretion. The record made by the two arbitrators indicates that they fully discharged their duty under the treaty, and such was the view of their governments, as attested by acts which neither of them can now reverse or evade.

The Brief of Nicaragua, as has been shown, even goes so far as to assume the extraordinary position that the two arbitrators, in failing to "exhaust" the Diplomatic Corps, and then "delegating" power to the King of Spain, "abrogated the treaty." This is a new theory of abrogation, and is contrary to all previous conceptions. Heretofore, it has never been supposed that the failure of subordinate agents of a government to observe the stipulations of a treaty would effect its abrogation. Under such a rule, governments never could know from day to day what treaties were in force. Up to the present time it has been supposed that the contracting parties might even condone their own violations. Many authorities have so declared, and among them Vattel, who says:

When the treaty of peace is violated by one of the contracting parties, the other has the option of either declaring the treaty null and void, or allowing it still to subsist; for a contract which contains reciprocal engagements cannot be binding on him with respect

to the party who on his side pays no regard to the same contract. But, if he chooses not to come to a rupture, the treaty remains valid and obligatory.⁶

This view has been accepted by the Supreme Court of the United States. Under the extradition treaty between the United States and Italy of 1868, which bound the contracting parties to deliver up "persons" charged with certain crimes, the Italian Government in 1890 refused to surrender certain persons charged with murder in the United States on the ground that they were Italian subjects. The United States contended that the contracting parties, in the absence of an express exception, were obliged to deliver up their citizens or subjects. The Italian Government persisted in its refusal, but the United States continued to execute the treaty. In 1910 the Italian Government demanded the surrender by the United States of one of the latter's citizens charged with murder in Italy. The Department of State of the United States, although continuing to maintain the American interpretation of the treaty, decided to waive the requirement of reciprocity and issued a warrant of surrender. The fugitive then obtained a writ of *habeas corpus*, and the case eventually came before the Supreme Court, which held that the accused should be delivered up, saying:

If the attitude of Italy was, as contended, a violation of the obligation of the treaty, which, in international law, would have justified the United States in denouncing the treaty as no longer obligatory, it did not automatically have that effect. If the United States elected not to declare its abrogation, or to come to a rupture, the treaty would remain in force. It was only voidable, not void; and if the United States should prefer, it might waive any breach which in its judgment had occurred and conform to its own obligation as if there had been no breach.⁷

The submission of the dispute to the King of Spain was both lawful and regular. After mentioning the Diplomatic Corps in Guatemala as a source of choice, the treaty next authorized the selection of "any public personage," whether a foreigner or a Central American; but this could be done only "by agreement," and if such agreement turned out to be "impossible," the submission was to be to the Government of Spain. The treaty prescribed no test of impossibility. According to the theory of specific and recorded effort, the two arbitrators should have searched through the *Blue Books*, *Parliamentary Registers*, "*Who's Who*," and other repositories of fame, and, when at length, convinced of the futility

6. *Law of Nations*, p. 452.

7. *Charlton v. Kelly* (1912), 229 U. S., 447, 473, citing Vattel, *supra*.

of their quest, should have made a Diogenic entry of their disappointments with their fellowmen. But they did nothing of the kind. Evidently sensible of the seriousness of their task, they followed the directions of the treaty in an ingenuous, reasonable way, and having, as they declared, taken the previous steps without result, turned, as the treaty required, to the Government of Spain.

At this point, all the deft display of fanciful irregularities in the arbitration collapses. The treaty does not prescribe how the Spanish Government was to be notified. It was only in case of default by that government that the foreign offices of Honduras and Nicaragua were to intervene and choose a South American Government as arbitrator. But this stage never was reached. The two arbitrators, proceeding in the order of the treaty, ceremoniously called in the Spanish Minister at Guatemala City and acquainted him with the high and responsible duty that awaited his Sovereign, and their action was ratified by their governments. In recording their proceedings, the two arbitrators spoke of the King as "third arbitrator"; but in so doing, they correctly interpreted their action, as well as the meaning of the treaty, by declaring, at the same time, that "*it was to be understood that upon him, exclusively, rested the rights conferred by the Gámez-Bonilla treaty, the basis of this session,*" and that "it was further agreed by the parties to give His Majesty such latitude as he might deem necessary for the preparation of his award upon consideration of the briefs and documents presented."

There is not a line or a word in this record to give color to the assumption that the two arbitrators either attempted to make, or supposed that they were making, to His Majesty, either a "delegation" or "surrender" of their own powers, of any "delegation" or "surrender" of power whatsoever. In saying that it was "agreed by the parties," they manifestly meant their governments—the only parties to the treaty which, in the same sentence, they declared to be the "basis" of the session; while, in speaking of the "latitude" to be exercised by His Majesty in the "preparation of his award," it is equally clear that what they had in mind was the rule that, "when the head of a state is chosen as arbitrator it is not understood that he must examine into and decide the matter personally," but that "he may, and generally does, place the whole affair in the hands of persons designated by him, the decision only being given in his name."⁸ In the present instance the application of the rule was directly justified by the fact that the treaty

8. Hall, *International Law* (5th ed.), p. 362.

designated, not the "head" of the state personally, but its government.

It is not less obvious that the treaty never contemplated, and that neither of the parties to it ever imagined, that the Government of Spain or "any other government" should act in any capacity but that of sole arbitrator, or should come to Guatemala for that or for any other purpose. In so affirming, we only treat the contracting parties with becoming gravity. It is needless to say more on this point.

Nevertheless, in order to avoid the imputation of neglect, it is permissible to give formal *cong  * to what is said in the Nicaraguan Brief on the subject of a "majority vote." The proceeding having passed beyond the stage of "tripersonal" arbitration, the consideration of the question is necessarily irrelevant. It is, however, proper to remark that Article VII of the treaty, when it stipulates that "the arbitral decision rendered by majority vote," shall be final, cannot be interpreted as implying that a decision by a sole arbitrator would not be equally so. As in the case of the Halifax award, the question has occasionally been raised as to whether, where the tribunal is composed of two or more members, the vote must not be unanimous. The treaty in terms safeguarded that point. It was superfluous to mention the decision of a sole arbitrator.

3. THE AWARD

(a) *Legality of Its Rendition*

In our tour of inspection, we now approach what may be called the "Big Bertha" of the Nicaraguan argument. This formidable-looking weapon, perhaps with a view to distribute the risk of internal combustion, is placed in special charge of learned counsel for Nicaragua; but on examination we shall find that, like the smaller artillery, it is not a real gun but only an exceedingly frail simulation.

Nicaragua claims that the award of December 23, 1906, is invalid because, as she now says, it was rendered after the expiration of the ten years during which the treaty was by its terms to "remain in force." The treaty was signed on October 7, 1894; the ratifications were exchanged on December 24, 1896; the award was rendered on December 23, 1906, the last day of the ten-year term, counted from the exchange of ratifications. That term, if reckoned from the signature of the treaty, was indeed within three months of its expiration when the acceptance by His Majesty of the office of arbitrator was requested. These facts conclusively show that the contracting parties and their representatives, and the arbitrator

himself, all deliberately acted upon the interpretation, which was then unquestioned, that the ten years during which the treaty was to "remain in force" were to be counted from the day on which it came into force, namely, the day of the exchange of ratifications.

In these circumstances, what has Nicaragua now to say? The Brief remarks (p. 53), that the treaty "went into execution" on February 24, 1900, "by the organization of the Mixed Boundary Commission at San Marcos de Colon, a frontier town of Honduras," but, as it evidently did not come into full "execution" at that time, it is elsewhere maintained, and especially so in the argument of counsel, that it *came into force* on the day of its signature.

In support of this contention, the memorandum of counsel states that "by international law and custom a provision fixing the time for the duration of a treaty relates to the date of its signature in the absence of any express stipulation to the contrary." The memorandum further declares that this supposed rule "is invariably treated as an axiom of international law by all authoritative writers on the subject as well as in judicial decisions," and that it is recognized in the "custom and practice" of both Honduras and Nicaragua, "conclusive evidence of their knowledge and acceptance" of it being furnished by the treaties negotiated between them.

With all deference to the representatives of Nicaragua, I am obliged to affirm that no such rule exists, and that the works and judicial cases, cited by title but not quoted or examined by Nicaragua, neither discuss nor mention such a rule, but relate to an essentially different question.

But, first of all, I will dispose of the "conclusive evidence" supposed to be furnished by the treaties between the two countries. Exclusive of the Gámez-Bonilla treaty, the terms of which are now under discussion, it consists of the citation of seven treaties, each of which expressly designates, as the period of its duration, a term of years "*counted from the date of the exchange of ratifications.*" It is argued that the contracting parties in each instance advisedly inserted this stipulation, for the conscious purpose of avoiding the "rule of international" law, which otherwise would have reckoned the term from the signature of the treaty.

I not only accept the "conclusive evidence" but will add to it. A similar stipulation may be found in the treaties of Honduras and Nicaragua with the United States. Moreover, an examination of the treaties of the United States will show that, while in some cases nothing is said as to when the various stipulations are to be considered as effective, yet, where a definite

term is prescribed during which they are to *remain in force*, it is counted from the exchange of ratifications, and occasionally from even a later date, in at least 125 cases, as against about 10 that take the date of signature. And having disclosed this preponderance, which is characteristic of treaties in general, I will venture to say that the theory, that the constant recurrence of a particular conventional stipulation is proof that there exists a rule of international law to the contrary, is not only a novel theory, but that it is directly opposed to an ancient and accepted canon of interpretation.

Grotius enumerates among the sources of international law "Customs and Treaties"; and it has been laid down that, "when a special rule has been recognized as binding by a series of treaties it approaches to general international law in the proportion in which these treaties represent the civilized world as a whole."⁹

Bynkershoek, one of the most precise and authoritative of writers, in his chapter on contraband, says:

The law of nations on this subject is not to be drawn from any other source than reason and usage. . . . Usage is pointed out by the constant and as it were perpetual custom which sovereigns have been in of making treaties and laws upon this subject, for they have often made such regulations by treaties to be carried into effect in case of war, and by laws enacted after the war began. I have said *by, as it were, a perpetual custom*; because one or perhaps two treaties, which vary from the general usage, do not alter the law of nations.¹⁰

Similar expressions will be found elsewhere in Bynkershoek.

Klüber mentions, among the sources of international law, "first of all the conventions or treaties of nations, express or tacit."¹¹

Heffter declares that "international conventions with the negotiations that precede them are without doubt the most fruitful source of law of nations"; that "their texts and their spirit witness the agreement of nations and of governments."¹²

Burke, referring to the *corps diplomatique*, observed that "this vast and voluminous collection . . . forms the code or statute law, as the methodized reasonings of the great publicists and jurists form the digest and jurisprudence of the

9. Wharton, *Commentaries on Law*, 119, 120, pp. 188, 192.

10. *Treatise on the Law of War, being the First Book of "Quaestiones Juris Publici," with Notes* by du Ponceau (Philadelphia), p. 76.

11. *Droit des Gens Moderne de l'Europe* (Paris, 1861), p. 4.

12. *Le Droit Public Européen*, (Bergson ed. by Geffcken, Paris, 1888), p. 26.

Christian world. In these treasures are to be found the *usual* relations of peace and amity in civilized Europe." ¹³

Phillimore, speaking of the "*consent of nations*" as a source of international law, says that such consent is "evidenced by the contents of treaties"; that it is "a sound maxim that a principle of international law acquires additional force from having been solemnly acknowledged as such in the provisions of a public treaty." ¹⁴

Wheaton, treating of the sources of international law, says: What has been called the positive or practical law of nations may also be inferred from treaties; for though one or two treaties, varying from the general usage and custom of nations, cannot alter the international law, yet an almost perpetual succession of treaties, establishing a particular rule, will go very far towards establishing what that law is on a disputed point. Some of the most important modifications and improvements in the modern law of nations have thus originated in treaties. ¹⁵

Hall, while combatting the theory that treaties are, as he expresses it, "more important indications than unilateral acts of the opinion of contracting parties as to what is, or ought to be the law," and remarking that there appears to be no ground "for their claim to exceptional reverence," says that "they differ only from other evidences of national opinion in that their true character can generally be better appreciated," since "they are strong, concrete facts, easily seized and readily understood," as "marking points in the movement of thought." And he justly observes that "authority will attach" to "indications of national opinion in proportion to their number and to the length of time during which they have been repeated." ¹⁶

Says Calvo:

29 . . . In all cases, and whatever may be the nature and bearing of their stipulations, treaties are incontestably the most important and most unimpeachable (*irrecusable*) source of international law. This is so true that all the publicists, in accord on this point with the reason of the thing, admit that a series of treaties resolving in a uniform manner an identical question may be considered as expressing the opinion of nations on the matter. Moreover, if we reflect that external public law is an unwritten law, whose codification consequently has not yet been possible, it is necessary to recognize, with Heffter, whose opinion I share, that the texts and interpretation of international treaties are the most evident testimony of the accord of governments. ¹⁷

13. Letters on a Regicide Peace," *Works*, IX, 235; cited by Phillimore, *International Law* (3d ed.), I, 46.

14. *International Law* (5th ed. 1885), pp. 38, 46-48, 53.

15. *Elements of International Law* (Phillipson ed. London, 1916), p. 24.

16. *International Law* (5th ed. 1904), pp. 7, 11, 12.

17. Calvo, *Droit International* (5th ed.), I, 160.

Hershey, who gives an industrious review of this subject, speaks of "convention or express agreement by means of treaties" as "primary sources of positive international law." He also notices the fact that "writers frequently confuse the *sources* of international law with its basis or foundation on the one hand, and the evidence or witnesses to its existence on the other," and that it is necessary to bear this fact in mind in estimating the very unrestricted scope allowed by certain writers, such as Oppenheim, as to the "sources" of international law.¹⁸

So far as concerns the Nicaraguan theory that general conventional usage is to be regarded as evidence of the existence of a contrary legal rule, it would be idle to pursue it further. I will now turn to the specific consideration of the Gámez-Bonilla treaty.

(b) GÁMEZ-BONILLA TREATY

In reckoning the term of years during which it may be stipulated that a treaty is to *remain in force*, it would be natural and logical to count from the day on which the treaty *came into force*.

It is obvious that, by its very terms, the Gámez-Bonilla treaty was not to come into full force until the exchange of ratifications. This clearly appears by the following stipulations:

1. By Article VIII, the convention was to be submitted, both in Honduras and in Nicaragua, to "constitutional ratifications"; and, within sixty days after both governments should have ratified it, the ratifications were to be exchanged either in Tegucigalpa or in Nicaragua. No term was fixed within which the governments were severally to effect their constitutional ratifications.

2. That, pending the exchange of ratifications, the treaty was not intended or understood by the Contracting Parties to come into force, is clearly shown by the next succeeding article, Article IX, which, while stipulating that the provisions of Article VIII should not "prevent" the "immediate organization" of the Mixed Commission, also stipulated that the commission should "begin its studies within two months after the final ratification," i.e., after the exchange of ratifications. Thus, while the appointment and organization of the commission might immediately take place, it was not to begin its studies—its actual work on the boundary question—until the ratifications had been exchanged. This being established

18. *Essentials of International Public Law*, p. 19.

as the starting point or date of execution, the Article then expressly stipulated that, if the ratifications were delayed, the Mixed Commission might begin its studies prior to such exchange, should this be necessary in order to take advantage of the dry or summer season. But for this stipulation, it is evident that the Mixed Commission would have had no power to begin its studies prior to the exchange of ratifications.

3. With the date of exchange thus fixed in their minds as the date of the coming into force of the treaty, the Contracting Parties then agreed (Art. X) that, "whether or not the Mixed Commission should have begun its labors," the two governments should, "immediately after the exchange of ratifications," appoint arbitral representatives, one each, in order that such representatives might, as a "preparatory commission," proceed to the appointment of a third arbitrator. As the arbitration (Art. IV) was to take place only in the event of a disagreement of the Mixed Commission, there was no reason why the steps preparatory to its organization should have been deferred until after the exchange of ratifications, had that date not been in the minds of the Contracting Parties as the date from which, with the single exception expressly stipulated, the convention was to come into force and its execution was to begin.

4. In harmony with this design, it was finally stipulated (Art. XI) that the convention should "remain in force for ten years, in case its execution be interrupted." The meaning and intention of this clause are plain. The primary object of the Contracting Parties was the termination, in an amicable manner, of their differences as to their common boundary. It was for the accomplishment of this high purpose that the convention was made. The Contracting Parties therefore desired that the convention should be fully and completely executed. How long this might take, they could not foretell; but, foreseeing that, besides the annual interruption by the rainy season, other delays and interruptions in the accomplishment of the processes of the convention might occur, they intended to assure ample time for its execution, and accordingly designated for that purpose the term of ten years. It is equally obvious that the only way the full benefit of this term could be assured was by computing it from the date when the convention was to come into force, namely the date of the exchange of the ratifications. In conformity with this plan, although it was *permissively* stipulated that the Mixed Commission might, if necessary to avail itself of the dry season, begin its studies before the exchange of ratifications, it was

only within two months after that date that the beginning of such studies was *obligatory*.

The interpretation thus placed upon the terms of the treaty is in precise conformity with the rules of international law. There is not now, nor can there be, a rule that treaties, in the sense of actual, positive execution or performance, come into force on their signature.

The representatives of Nicaragua, in the effort to sustain their contention, have done me the honor to quote from my *Digest of International Law* (V, 244) the following rule:

A treaty is binding on the contracting parties, unless otherwise provided, from the date of its signature, the exchange of ratifications having, in such case, a retroactive effect, confirming the treaty from that date.

At the place indicated, several authorities are cited, the first of which is the case of *Davis v. Concordia*, 9 Howard, 280.

On the next page of the same work will be found the following additional statement:

But a different rule prevails when the treaty operates on individual rights. The principle of relation does not apply to rights of this character, which were vested before the treaty was ratified; it is not to be considered as concluded until there is an exchange of ratifications.

The case of *Davis v. Concordia*, 9 Howard, 280, is again cited. So, also are the Notes of the late Bancroft Davis, on the treaties of the United States. In fact, the two passages above quoted from my *Digest of International Law* will be found in combination to constitute Rule II laid down by Davis for the interpretation of treaties.¹⁹

The rule or rules laid down are, as far as they go, correct; but they lend no support whatever to the Nicaraguan contention that the term of ten years, during which it was stipulated that the Bonilla-Gómez treaty should remain in force, is to be reckoned from the date of its signature or from any other date than that of the exchange of ratifications.

The statement that a treaty is "binding" on the contracting parties, unless otherwise provided, from the date of its signature, by no means implies that its execution is to be considered as having begun at that date. The two ideas are not only distinct, but are to a certain extent altogether opposed.

Without regard to the question of retroactivity and the different categories to which it necessarily gives rise, it is obvious that a treaty is from the moment of its signature

19. *Treaties and Conventions, 1776-1887*, p. 1228.

"binding" upon the contracting parties in the sense that, pending the question of its ratification, they are bound to do nothing that is inconsistent with its terms, or that tends to alter the situation or to destroy or deteriorate the subject-matter. The cases cited in support of this rule are precisely cases of that nature. Almost without exception they relate to the question whether a sovereign, after signing a treaty for the cession of territory, was at liberty, pending the ratification of the treaty, to grant away the public domain. A negative answer could have been given only on the assumption that the signing of the treaty created no engagement whatever, but left the ceding power free to face about and transfer the territory to another party. The views expressed by the judges in the various cases are by no means in accord as to the extent to which "sovereignty" might be held to pass prior to the exchange of ratifications. None of them suggested that there was a complete transfer of sovereignty, and the question of degree is immaterial. But the only rule laid down, and the only point decided, was that which I have stated, namely, the prohibition, pending the question of ratification, so as to change the situation as to deprive the parties of the power to fulfil the engagements which they had voluntarily contracted.

The difference between this principle, and the contention that the positive execution or performance of the treaty must, in the absence of a contrary stipulation, be considered as beginning at the date of signature, is not a difference measured by what has been metaphorically termed the "twilight zone," but is measured by the difference between noonday and midnight. For the contention that positive performance begins with the date of signature, no authority whatever can be adduced.

In so saying, I am not unaware of the fact that phrases may be found in a few early writings, which, although they by no means go the length of the Nicaraguan contention, very strongly emphasize the obligation on the part of the sovereign to carry into effect a treaty which his representative possessing full powers has signed. As not infrequently happens, later writers and even courts have repeated these phrases without taking account of the fact that they were used in days when there was not in the world a single head of a state who was obliged to submit his acts in treaty-making to the ratification or approval of any other authority whatsoever. But, even in the earlier times, it was conceived to be unreasonable to deny the sovereign an opportunity to consider whether his plenipotentiaries had acted within their powers, nor was it conceived that the positive execution of the treaty could begin

before the sovereign ever knew what it contained. For the most part, if the exchange of ratifications was required, the treaty took effect, in the full sense, on the exchange of ratifications, while it was of course binding in the prohibitive sense, from the date of its signature.

Among the earlier publicists, perhaps the one most frequently cited is the German writer, von Martens, in whose *Précis*, or Summary, of the Law of Nations, it is laid down that

everything that has been stipulated by an agent in conformity with his *full powers*, ought to become obligatory for the state from the moment of signing, without even waiting for the ratification. However, not to expose a state to the errors of a single person, it is now become a general maxim, that public conventions (but not simple military arrangements in time of war) do not become obligatory, till ratified. The motive of this custom clearly proves that the ratification can never be refused with justice, except when he who is charged with the negotiation, keeping within compass with respect to his public full powers, has gone beyond his secret instructions, and, consequently, has rendered himself liable to punishment; or when the other party refuses to ratify.²⁰

Among those who cite Martens is Heffter, who says that when a treaty has been concluded by an agent within the limits of its mandate, sovereign States today regard the ratifications and their exchange as a necessary complement for their validity, even though the ratification was not expressly reserved; but that the ratification gives to it a retroactive force to the date of conclusion, save in the case of a stipulation to the contrary; and that the ratification cannot in truth be morally refused, if the treaty was concluded in conformity with the terms of the full powers presented to the other party.²¹

Geffcken, in the same place, discusses the foregoing view very luminously, declaring that Heffter did not seem to be well possessed of the question.

In the ancient practice [says Geffcken] they demanded ratification only if it was reserved in the full powers of the treaty; today it is always reserved. But in the traditional use of language they preserve a distinction between the conclusion and the ratification of the treaty, which is inaccurate, considering that the treaty is not regularly perfect, though concluded, until after the exchange of ratifications. If, differing from private law, sovereigns alone regularly conclude treaties, but not their mandataries, the reason is not, as Amari (*Trattato sur dir. intern. publ. di pace*, p. 758) and Jellinek (p. 54)

20. Cobbett trans. (Philadelphia, 1795), pp. 49-50.

21. Heffter, *Droit International de l'Europe* (Bergson ed. by Geffcken, Paris, 1883), pp. 199-203.

allege, in the fact that this right forming an integral part of the sovereignty can not be transmissible. The transmission, on the contrary, may perfectly take place; for example, a sovereign may give full power to a governor not only to negotiate but to conclude a capitulation and consequently bind the State.

But, till the exchange of ratifications, continues Geffcken, "the treaty does not yet exist." What usage usually wrongly calls the conclusion of treaties is, he affirms, in reality only the signing by the mandataries. This signing is not an act without importance, since it denotes their conviction that the intention of their mandates has been fulfilled. But a government which needs the assent of another factor in its political life for the validity of a treaty cannot, declares Geffcken, ratify it without such assent.

That the ratification [he goes on to say], gives the treaty a retro-active force, is hardly admissible, unless it has been specially so stipulated, since it is only by the exchange of ratifications that the contracting parties are bound and only after this exchange that the treaty can be made public and become obligatory for the subjects of the State. Even in the exceptional cases [adds Geffcken] where it is agreed that the execution of the treaty concluded by the mandataries shall begin without awaiting the ratification, as in the case of the treaty of the four powers against Mehemed-Ali in 1840, the ratification is nevertheless reserved, as is indicated by the expression "without awaiting the exchange of ratifications," sanctioning in a retrospective manner this exceptional procedure.

Before proceeding further with writers, I will examine the judicial decisions in the United States, and first in order the case of *Arredondo*, as the one most frequently cited. The facts in this case are that on December 22, 1817, a duly authorized representative of the King of Spain made to one Arredondo, a Spanish subject, a grant of lands in the Spanish province of East Florida. The grant was made in absolute property, subject only to the condition that Arredondo should within three years establish on the land two hundred Spanish families. Compliance with this condition having for a time been prevented by the disturbed condition of the province, the same representative of the King of Spain, by a decree of December 2, 1820, granted an extension of the period of settlement for a year. On February 22, 1819, Spain had by treaty ceded the Floridas to the United States. The ratifications were not exchanged till February 2, 1821. The grant was attacked on various grounds, among which was the contention that, as the extension of December 2, 1820, was decreed after the ratification of the treaty by the King of Spain, it must be considered to have been made without authority. This contention the Supreme Court rejected, saying:

The ratification by the United States was in February following, and the treaty did not take effect till its ratification by both parties operated like the delivery of a deed to make it the binding act of both. That it may and does relate to its date as between the two governments, so far as respects the rights of either under it, may be undoubted; but as respects individual rights, in any way affected by it, a very different rule ought to prevail.

The court accordingly held that, so far as concerned the case before it, the date of the treaty was that of the exchange of ratifications. This was the only point the court decided. The remark that the treaty, so far as concerned the "rights" of either government under it, "related" to the date of signature, whether correct or incorrect, was only a casual expression of *obiter dictum*.²²

Subsequently there directly came before the Court in numerous cases the question whether grants of land, made by the ceding power after the signature of the treaty of cession but before the exchange of ratifications, were to be treated as valid. The Court answered in the negative, and it was with reference to this situation that the court spoke of the obligation which the grantor had violated as relating back to the signature of the treaty. This doctrine is not open to criticism. But, in the leading case of *Davis v. The Police Jury of Concordia* the attention of the court was specifically drawn to the very broad language which judges had sometimes used as to the retroactive passing of "sovereignty"; and in this relation much emphasis was placed by counsel upon the case of *The Fama* (1804, 5 Rob., 106), in which Sir William Scott held that the national character of territory agreed to be ceded by treaty, but not actually transferred, continued to be that of the ceding power prior to the exchange of the ratifications of the treaty. Thus confronted with the question, the Court declared that Sir William Scott's opinion "coincided" with its own "views respecting sovereignty over ceded territory, and the commercial character in which a people of a distant settlement are placed, by a treaty of the state to which they belong, and by which they are stipulated to be transferred to another power, before the delivery of the territory has been made"; and in conclusion the court precisely declared: "In fact, the full sovereignty in such case is not in one or the other of the contracting parties, but in both, for either to do whatever is essential to the preservation of the ability of each to consummate their contract, according to its terms."²³

22. *United States v. Arredondo* (1832), 6 Peters, 691.

23. *Davis v. Police Court of Concordia* (1850), 9 Howard 280, 292, 293.

Such is the extent and the full extent of the rulings in question.

It is on the strength of these rulings and with precise citation of them that Crandall, a very careful writer, in discussing the date when a treaty takes effect "as a compact between states," says:

A treaty is not definitely binding until the exchange of ratifications has taken place, and is accordingly not finally operative before that date. This results from the right of ratification, now generally recognized even though not expressly reserved in the treaty or full powers of the negotiators, and from that principle of mutuality by which neither party is bound by a contract until the other is also. . . . Even if it is expressly provided in the treaty that it shall go into effect immediately upon its signature, its operation is provisional, and subject to the final ratification of the parties; and, in case of rejection, acts by either party done in anticipation of a ratification are without validity. Although a treaty is inchoate and not definitely binding until the exchange of ratifications, it is in good faith provisionally binding from the date of signing in the sense that neither party may, without repudiating the proposed treaty, voluntarily place itself in a position where it cannot comply with the conditions as they existed at the time the treaty was signed. . . . To this extent the exchange of ratifications has a retroactive effect as to the rights of the contracting parties, confirming them as of the date on which the treaty was signed.²⁴

In the *Insular Cases*, the Supreme Court held that the right to recover duties on goods imported into Porto Rico was limited to those brought in after the exchange of ratifications on April 11, 1899, although each government had long previously ratified the treaty, and the *exchange* only awaited the arrival of the Spanish ambassador in the United States.²⁵

The modern law on the subject is admirably summed up by a learned writer, Phillipson, who, in a work published in 1916, says:

If no other date has been specified, the treaty comes into effect and acquires binding force on the date of the exchange of ratifications. This rule is accepted by most publicists and jurists since Vattel. . . . There can be no doubt that modern usage has established the rule; and, it is submitted, it may now be considered a fundamental principle of international law. Generally a condition of subsequent ratification is inserted in the full powers of plenipotentiaries or in the treaty concluded by them; and when not so inserted, it is implied, that is, of course, if it is not expressly dispensed with by the competent authorities, (e.g. by previously

24. *Treaties, Their Making and Enforcement* (2d ed.), p. 343.

25. *Dooley v. United States*, 182 U. S., 222.

sanctioning the very terms arrived at) a proviso that applies to the entire sphere of treaty-making.²⁶

Oppenheim observes that, apart from express stipulations to the contrary, "the fact that ratification imparts the binding force to a treaty seems to indicate that ratification has regularly no retroactive effect."²⁷

Hall likewise states that, except as to "effects which are capable of being retroactive," and "stipulations the execution of which during the interval between signature and ratification has been expressly provided for," "ratification is considered to be complete only when instruments containing the ratifications of the respective parties have been exchanged. So soon as this formality has been accomplished, and not until then, the treaty comes into definite operation."²⁸

It would be superfluous to cite further authorities on a point which, except in the contention of Nicaragua, is not questioned.

(c) *BINDING INTERPRETATION*

It has been demonstrated that, upon firmly established principles of international law, the ten years during which the Gámez-Bonilla treaty was to remain in force must be reckoned from the date of the exchange of ratifications. But, Honduras is not obliged to rely on general rules, no matter how conclusive they may be; for the treaty has directly received the most authoritative and most binding interpretation of which an international compact is susceptible.

Writers commonly tell us that the authoritative methods of interpreting treaties are (1) arbitration and (2) the concurrent action of the contracting parties. *The Gámez-Bonilla treaty has been interpreted by both*; and by every principle of law, governing the conduct of nations as of men, Nicaragua is bound by that interpretation.

It must be emphasized [says Oppenheim] that the interpretation of treaties is in the first instance a matter of consent between the contracting parties. If they choose a certain interpretation, no other has any basis. . . . In regard to the interpretation given by the parties themselves, there are two ways open to them. They may either agree informally upon the interpretation and execute the treaty accordingly. Or they may make an additional new treaty and stipulate therein such interpretation of the previous treaty as they choose.²⁹

26. *Termination of War and Treaties of Peace*, pp. 194-198.

27. *International Law* (2d ed.), I, 518.

28. *Idem* (5th ed.), p. 334.

29. *Idem* (2d ed.), I, 553.

Treaties are to be viewed in two lights:

in the light of politics and in the light of juridical law. The decision of political questions is preeminently the function of the political branch of government, of the Executive or of Congress, as the case may be; and when a political question is so determined, the courts follow that determination.³⁰

The treaty, signed in 1819 and ratified in 1821, by which Spain ceded the Floridas to the United States, gave a detailed description of the boundary between the two countries west of the Mississippi, concluding with the clause: "The whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the first of January, 1818." A portion of the line formed the northern boundary of Texas, then a part of Mexico, and, after the annexation of Texas to the United States, a question arose as to whether a certain tract of land belonged to the distinctive public domain of the United States or the State of Texas. This question, involving the determination of the meaning of the treaty, was eventually referred to the Supreme Court of the United States. The court said that "undoubtedly the intention of the two governments, as gathered from the words of the treaty, must control," and that "the entire instrument must be examined in order that the real intention of the contracting parties must be ascertained." In order to determine that intention, the court examined (1) the diplomatic correspondence that led up to the signing of the treaty, (2) certain legislation of the Republic of Texas of 1836, (3) a convention between the United States and that Republic of 1838, (4) an agreement between the United States and the State of Texas in 1850, and various other documents. The Court concluded from this evidence, that while the line agreed upon was, "speaking generally," to be as laid down on Melish's map, it was expected to be fixed later with more precision. But, there was, said the Court, "another and perhaps stronger view" of the question, resting upon "the official acts of the general government and of Texas," which virtually constituted a "contract" between them. Even if the treaty had not, "upon a reasonable interpretation of its provisions," left it open to the contracting parties later to fix the line with more precision, "we should," declared the Court, "feel obliged to hold that the convention or contract between the United States and Texas, as embraced in their respective enactments of 1850, together with the subsequent acts of the two governments," required the line mentioned in the treaty to be the one recognized in those acts.³¹

30. *Treaties and Conventions, 1776-1887*, pp. 1227-1228.

31. *United States v. Texas* (1895), 162 U. S., 1, 36-37, 42.

Crandall, in his work on treaties, says: "A practical and common construction of the terms of a treaty by the parties through proper representatives shortly after its conclusion is quite conclusive as to their meaning." He gives, as his first example, the case of Article 7 of the treaty between the United States and Spain of 1795, which provided that citizens or subjects of the contracting parties, "their vessels or effects," should not be liable to any "embargo or detention." The question subsequently arose as to whether this clause embraced effects on land or only vessels and their cargoes. The United States contended that the Article applied to property on land as well as to property at sea. The Spanish Government at first denied the correctness of this construction, but later acquiesced in it. It was subsequently held by the Spanish Treaty Claims Commission in 1903 that, without regard to whether the Clause was "originally intended" to embrace property on land, the interpretation given to it by the United States, and concurred in by Spain, would be applied by the Commission in making its decisions.

A second example is that of the decision of the commission under the convention between the United States and Mexico of June 24, 1910, on the question whether Article 5 of the treaty between the two countries of February 2, 1848, as renewed by the treaty of 1853, established, as Mexico contended, a fixed and invariable line which was not affected by the action of the river. The commission held that the two nations had by their subsequent treaties and their consistent course of conduct in connection with all cases arising thereunder, put such an authoritative interpretation upon the language of the treaties of 1848 and 1853 as to preclude them from now contending that the fluvial portion of the boundary created by those treaties is a fixed-line boundary.

A third illustration given by Crandall is that of the decision of the King of Sweden and Norway as arbitrator on a question referred to him by the United States, Great Britain, and Germany, growing out of the General Act of Berlin of June 14, 1889, for the neutrality and autonomous government of the Samoan Islands, by which it was agreed that none of the contracting parties should exercise any "separate control of the Islands or the governments thereof." Subsequently, a question arising under the General Act was, in conformity with its terms, referred to the Chief Justice of Samoa for decision. His decision was rendered in 1898. The consular representative of Germany objected to it because the proceedings had not been carried out in accordance with the provisions of the General Act. The American and British consular representatives ac-

cepted the decision and their naval authorities proceeded to enforce it, thereby causing some destruction of private property. This destruction gave rise to claims, and in answer to them it was contended that there was no limitation on the right of any of the signatory powers to enforce the provisions of the act and *a fortiori*, that two of them, constituting a majority, were entitled to take military action for that purpose. The arbitrator decided otherwise, and in so doing, not only consulted the negotiations leading up to the conclusion of the General Act, but also the subsequent practice of the contracting parties by which the arbitrator held it to be established that they had accepted, as governing the execution of the General Act, the principle of unanimity.

The fourth example given by Crandall relates to a case that arose between the United States and Japan. Article 4 of the treaty of 1857 provided that Americans committing offenses "in Japan" should be tried by the American consuls. Article 6 of the treaty of 1858 defined the American consular jurisdiction as applying to "Americans committing offenses against Japanese"; and Article 12 declared that "all the provisions of the treaty of 1857 had been incorporated therein, and that the earlier treaty was revoked." Subsequently, the Supreme Court of the United States was required to determine whether a citizen of the United States, who had been convicted in an American consular court in Japan of an offense against a person other than a Japanese, was lawfully condemned and held in custody. The Supreme Court held that, as the revocation of the treaty of 1857 was made upon the declared assumption that all its provisions were incorporated in the treaty of 1858, the revocation should be limited to the provisions so incorporated, and that the provisions of 1857 not so incorporated remained in force. In so deciding, the Court said: "This has been the practical construction given to the alleged revocation by the authorities of both countries—a construction which, in view of the erroneous statement as to the incorporation into the new treaty of all the provisions of the former one, is reasonable and just."³²

So far reaching are the effects of the concurrent action of the contracting parties that it is laid down by eminent authorities that treaties may in that way even be tacitly ratified and tacitly renewed. "Tacit ratification," says Hall, "takes place when an agreement, invalid because made in excess of special powers, or incomplete from want of express ratification, is wholly or partly carried out with the knowledge and permis-

32. *In re Ross*, 140 U. S., 453, 466. Crandall, *Treaties, Their Making and Enforcement* (2d ed. Washington, 1916), §167, pp. 383-387.

sion of the state which it purports to bind." *International Law* (5th ed. 1904), p. 330. Vattel, while observing that "the tacit renewal of a treaty is not to be presumed on slight grounds," suggests situations in which a treaty may be held to be either tacitly renewed or "tacitly continued."³³

The interpretation of treaties, express or implied, by the contracting parties is indeed a matter of everyday occurrence; and this interpretation, especially when carried into effect, is binding on the parties both by the principles of law and by principles of good faith which the law enforces. In a comparatively recent case, in which a Territorial Government sought to repudiate the previously accepted interpretation of a contract to which it was a party, the Supreme Court of the United States declared that it was "somewhat staggering" to be told that "continuity of practice" was "not a legal interpreter of the meaning of the parties."³⁴

So too, we may say, it would be "somewhat staggering" to be told that, after the parties to a treaty of arbitration, acting upon a common and unquestioned interpretation of it, had gone before the arbitrator and invoked and obtained his award, either of them might, on grounds always in full view, but never the subject of objection either between the parties or before the arbitrator, repudiate the common and unquestioned interpretation on which they and the arbitrator all had proceeded, and deny that the arbitrator had the right even to sit or to act. Nor would it be less "staggering" to be told this, where the belated objections related almost wholly to questions of form or procedure of no essential importance.

The legal considerations against the position assumed by Nicaragua on this point are overwhelming and conclusive; but we should also bear in mind the fact, as set forth by the Representative of Honduras in No. 23 of his Rejoinder, that the award of December 23, 1906, was actually accepted by the Government of Nicaragua, and that six years elapsed before any allegation or question of nullity was raised. In adverting, however, to this circumstance I can only repeat (see *supra*, pp. 155-157) that no "acceptance" of the award by either of the parties to the arbitration was requisite in order to make its performance obligatory upon them.

IV. CONCLUSIONS

It has been shown that the attempt made by Nicaragua to impeach the validity of the award of 1906 has no legal founda-

33. *Law of Nations*, Bk. II, chap. xiii, §199 (ed. 1858, Philadelphia) pp. 213-214.

34. *Lowrey v. Hawaii* (1906), 206 U. S., 206, 223.

tion and is inadmissible. The review by the distinguished representative of Honduras of the historical and political antecedents of the case has demonstrated that the arbitral decision on the merits of the controversy was made with intelligence, impartiality and sound judgment. That the description of the line, which in fact connects Portillo de Teotecacinte with Cabo Gracias á Dios, begins with the one point rather than with the other, can be of no importance, except on the theory that the boundary from Portillo to Teotecacinte to the sea was to be run without regard to the jurisdictional rights of either party. This theory is altogether at variance with the treaty, which expressly adopts *ownership* as the fundamental principle on which the territorial claims of the parties are to be determined. It is, says the treaty (Art. II, par. 3), understood that each Republic is the "owner" of the territory which constituted the Province of Honduras or of Nicaragua, as the case may be, at the date of independence. As against territory "already fully proved," it is stipulated (Art. II, par. 4), that "legal value" shall not be accorded to "possession in fact." It is "on failure of proof of ownership" (Art. II, par. 5) that maps and documents are to be consulted. The same principle enters, as a condition, into the stipulation (Art. II, par. 6) that the Mixed Commission, "if it deems it advisable, may make compensation and even fix indemnities in order to establish as far as possible a well-marked natural boundary." If the commission had not been required to recognize and give effect to ownership, there would have been no occasion to make compensation or fix indemnities.

In this relation I would particularly refer to the proofs set forth by the Representative of Honduras in Nos. 17-22 and 56-58 of his Rejoinder, including the Royal Orders (*Reales Cédulas*) of 1745. The evidential value of the Royal Order, appointing Colonel Juan de Vera as "Governor and Commandant General of the Province of Honduras" and of that appointing Brigadier Alonso Fernandez de Heredia as General Commander over Costa Rica, is of the highest and most conclusive order. Nor could there have been more competent and authoritative judges of their legal force and effect, as bearing upon the boundary question between Honduras and Nicaragua, than the Royal Arbitrator and the learned men who cooperated with him in the preparation and rendition of the award of December 23, 1906.

The contentions made by Nicaragua as to the line laid down by the arbitrator relate to questions which it was within his competency to determine, and his judgment on their merits is not open to attack. His Majesty exercised his powers under the

treaty with great care and circumspection. In an unusually real and comprehensive sense his award was the act of the government of which he was the head. In the first instance he constituted a commission to make a preparatory report on the allegations, arguments and proofs. Acting upon this report, and, as the award recites, in concurrence with the Council of State and with the Cabinet, he rendered his final decision.

The award was fully reasoned. All the requirements which even the speculations of writers have suggested were amply fulfilled. Nevertheless, all other argumentative expedients having been tried, the Brief of Nicaragua (p. 146, title of chap. 3) finally declares:

The Award indicates that the Briefs of Honduras were given special weight and that no weight was accorded to the arguments of Nicaragua.

Such complaints on the part of disappointed suitors are not uncommon. It is not charged that His Majesty and his advisers were guilty of misconduct, but it is intimated that they gave greater weight to the arguments on one side than to those on the other. This is an inference that may be drawn from every judicial decision, but we are not therefore to infer that the judicial balance was not accurate. On the contrary, it is rather to be presumed that the beam inclined to the one side or to the other, according to the intrinsic weight of that which is put into the scales.

Honduras, having already established her rights before the Arbitrator, may await with confidence the just and enlightened opinion of the Mediator.

May 8, 1920.

(Signed) JOHN BASSETT MOORE.

Counsel for Honduras.

APPENDIX

Fiore (Pasquale), *Trattato di Diritto Internazionale Pubblico* (3d ed. Torino, 1888).

Extract from II, 586-588.

1309. In un solo caso uno Stato può rifiutarsi dall' eseguire la sentenza arbitrale, e questo si è quando essa possa essere impugnata per nullità. I motivi sui quali può essere fondata l'azione di nullità possono a nostro modo di vedere essere i seguenti:

1. Se gli arbitri avessero pronunciato *ultra petita*, vale a dire fuori dei limiti del compromesso, ovvero sopra un compromesso nullo o scaduto;

2. Se la sentenza non fosse stata resa coll' intervento di tutti gli arbitri riuniti in collegio;

3. Se fosse stata pronunciata da una persona che non avesse avuto la capacità legale o morale per essere arbitro, o da un arbitro

che non fosse stato legalmente autorizzato a surrogarne un altro assente;

4. Quando essa no fosse motivata, o contenesse disposizioni contraddittorie o ineseguibili;

5. Quando fosse fondata sull'errore o estorta con dolo;

6. Quando le forme procedurali stipulate nel compromesso sotto pena di nullità, o quelle che devono reputarsi indispensabili secondo il diritto comune, perchè richieste dalla natura del giudizio, non fossero state osservate.

A schiarimento dei motivi sui quali ci sembra dover essere fondata l'azione di nullità osserviamo che essendo il compromesso quello che deve determinare l'oggetto in contestazione e non potendo gli arbitri pronunciare come giudici che intorno ad esso, o su di ciò che col medesimo sia strettamente connesso, secondo l'intenzione delle parti, si comprende come possa essere impugnata per nullità la sentenza pel motivo indicato nel n.1.

A riguardo del secondo motivo noi abbiamo già detto come per la validità della deliberazione su ciascuna questione sia indispensabile che tutti gli arbitri sieno riuniti in collegio e che la decisione risulti dal processo verbale preso a maggioranza.

A riguardo del quarto motivo notiamo, che per quanta larghezza di apprezzamento si possa ritenere concessa a gli arbitri non si può tuttavia concepire che essi possano decidere senza motivare assolutamente la loro decisione. Può anche concedersi che non debba essere assolutamente richiesta una motivazione ampia e formale per tutte le questioni discusse e decise, ma un'indicazione sommaria delle ragioni che abbiano motivato il dispositivo della sentenza arbitrale deve ognora ritenersi indispensabile onde potere attribuire ad essa autorità di giudicato. Non si potrebbe del pari riguardare come sentenza che ponesse fine definitivamente a ciò che fosse stato in contestazione, quelle nella quale la decisione fosse manifestata confusamente, o quando s'incontrasse nel dispositivo una manifesta contraddizione che rendesse impossibile o malagevole di stabilire esattamente e precisamente ciò che fosse stato deciso. Del pari sarebbe fuori della competenza del tribunale arbitrale se, chiamato a decidere intorno alla soddisfazione dovuta da uno Stato ad un altro da esso offeso, avesse condannato l'offensore a fare atti, che importassero un attentato all'indipendenza dello Stato o alla dignità ed all'onore del medesimo. Si dovrebbe a buon diritto riguardare come nulla perchè ineseguibile una sentenza che attentasse ai diritti inalienabili dello Stato.

In ordine all'errore de noi accennato come 5 motivo di nullità, notiamo che intendiamo discorrere dell'errore su quello che avesse formato l'oggetto principale del compromesso, e che avesse quindi motivata la decisione, e non già di quello sopra uno degli elementi accessori del giudizio, e che fosse stato tale da potere essere emendato. Rispetto a questo si comprende, come debba considerarsi sempre salvo il diritto della parti di domandare che l'errore venga corretto, ma che non si possa per tale ragione considerare nulla l'intera sentenza.

A riguardo del 6 motivo finalmente notiamo che per vizio di procedura non si potrebbe impugnare per nullità la sentenza, se non quando le parti medesime avessero stabilito nel compromesso le forme procedurali, che avrebbero dovuto essere osservate sotto pena di nullità. Però siccome certe forme devono reputarsi sostanziali ed indispensabili per la natura stessa del giudizio e la logica del diritto, così la loro inosservanza può legittimare l'azione per nullità. Così dovrebbe dirsi ad esempio se l'uno o l'altro degli Stati interessati nella controversia non fosse stato inteso o messo in grado di giustificare le proprie istanze e difendere i propri diritti.

1310. La semplice opposizione fatta da uno Stato di non volere eseguire la sentenza arbitrale per vizio di nullità non può essere di per sé stessa sufficiente ad esonerarlo dall'obbligo assunto di eseguirlo lealmente, ma può soltanto autorizzare la parte che l'abbia impugnata per nullità a sospenderne l'esecuzione, e siccome poi tale opposizione farebbe una nuova contestazione, se cioè la sentenza degli arbitri potesse o no essere attaccata per nullità, e non potrebbe ammettersi che la parte stessa che adducesse tale motivo potesse essere giudice della sua domanda, così bisognerebbe ammettere un nuovo giudizio arbitrale, il quale dovrebbe essere deferito a nuovi arbitri, i quali dovrebbero limitarsi a giudicare soltanto circa l'azione di nullità, e decidere se essa dovesse ritenersi ben fondata in diritto o se dovesse invece essere rigettata; e senza entrare più nel merito della contestazione, che avesse formato oggetto della sentenza arbitrale. Bisognerà quindi applicare a questo nuovo giudizio le regole esposte per l'arbitrato internazionale, e si dovrà soltanto ammettere, che durante il tempo necessario per decidere circa l'azione di nullità, debba essere sospesa l'esecuzione della sentenza arbitrale.

Fiore (Pasquale), *Tratado de Derecho Internacional Público*, Moreno trans., 2d ed. Madrid, 1894, III, 314-316.

1321. Solo en un caso podrá negarse un Estado a ejecutar la sentencia arbitral, a saber: cuando pueda tachársela de algún vicio de nulidad. Los motivos en que la acción de nulidad puede fundarse, deben ser a juicio nuestro los siguientes:

1. Si los árbitros hubiesen fallado *ultra petita*, esto es, fuera de los límites del compromiso, o sobre un compromiso nulo o que ya haya caducado;

2. Si no se hubiese dictado la sentencia con la intervención de todos los árbitros reunidos en corporación;

3. Si se hubiese dictado por una persona que no tuviera capacidad legal o moral para ser árbitro, o por una que no estuviese autorizada para sustituir a un árbitro ausente;

4. Si no se ha motivado el fallo, si en la parte dispositiva no hay congruencia o no es ejecutable;

5. Cuando se funde en un error o contenga dolo;

6. Cuando no se hayan observado las formalidades procesales estipuladas en el compromiso, so pena de nulidad, o las que deban

considerarse indispensable según el derecho común o por exigirlo la índole misma del juicio.

Para esclarecer los motivos sobre que parece debe fundarse la acción de nulidad, advertiremos que siendo el compromiso lo que debe determinar el objeto en cuestión y no pudiendo los árbitros dictar como jueces sino respecto del mismo o sobre aquello que esté con él en estrecha conexión según la intención de las partes, compréndese la razón por qué puede ser impugnada como nula la sentencia por el motivo indicado en el número primero.

Respecto del segundo motivo, ya hemos dicho que para la validez de la deliberación sobre cada cuestión es indispensable que todos los árbitros estén reunidos en colegio y que la decisión resulte del acta levantada por la mayoría.

Acerca del cuarto motivo advertimos que, por más amplitud de apreciación que se haya concedido a los árbitros, no puede concebirse sin embargo que puedan decidir sin motivar absolutamente su decisión. Puede también concederse que no se exija en absoluto una amplia y formal motivación para todas las cuestiones discutidas y decididas, pero debe considerarse indispensable para poder atribuir a la sentencia la autoridad de cosa juzgada una indicación sumaria de la razones que hayan motivado la parte dispositiva del fallo.

Tampoco podrá considerarse como sentencia que ponga fin definitivamente al litigio, aquella en que la decisión sea confusa o cuando en la parte dispositiva exista una evidente contradicción que haga imposible o muy difícil establecer con exactitud y precisión lo que se haya decidido.

Tampoco sería competente el Tribunal arbitral, si, llamado a decidir acerca de la satisfacción debida por un Estado a otro ofendido por éste, hubiese condenado al ofensor a realizar actos que entrañen un atentado a la independencia del Estado o a la dignidad y al honor del mismo. Se debe, con razón, considerar como nulo, porque sería inejecutable una sentencia que atentase a los derechos inalienables del Estado.

En lo que se refiere al error de que trata el núm. 5, como motivo de nulidad, debemos advertir que nos referimos al error sobre la cosa que haya sido el objeto principal del compromiso y que haya motivado la decisión, y no al error sobre uno de los elementos accesorios del juicio, y que haya podido pueda emendarse. Respecto a esto, se comprende que debe considerarse siempre a salvo el derecho de la parte a pedir que se corrija al error, pero no se puede por esta razón considerar nula toda la sentencia.

En lo referente al 6 motivo, advertimos que, por vicio del procedimiento, no puede impugnarse como nula la sentencia, a no ser cuando las mismas partes hayan establecido en el compromiso las formas procesales que deben observarse so pena de nulidad. Sin embargo, como ciertas formalidades, deben reputarse esenciales e indispensables por la naturaleza misma del juicio y la lógica del derecho, su inobservancia puede legitimar la acción de nulidad. Esto debe decirse, por ejemplo, si uno de los Estados interesados

en la cuestión no hubiere sido oído o colocado en condiciones de justificar sus demandas y defender sus propios derechos.

1,322. La simple oposición hecha por un Estado de no querer ejecutar la sentencia arbitral por vicio de nulidad, no puede ser por sí misma suficiente para eximirlo de la obligación adquirida de ejecutarla con lealtad, y únicamente puede autorizar a la parte que la haya impugnado por causa de nulidad a suspender su ejecución; y como dicha oposición daría origen a una nueva cuestión, esto es, a la de si la sentencia de los árbitros podía o no ser impugnada por la causa antedicha, y no podría admitirse que la parte misma que adujese dicho motivo pudiera ser juez de la demanda, convendrá admitir un nuevo juicio arbitral, que debería ser deferido a nuevos árbitros, los cuales habrían de limitarse a la cuestión de nulidad, y a decidir si esta acción debía considerarse fundada en derecho o si debía rechazarse, y sin entrar en el fondo de la cuestión que haya sido objeto de la sentencia arbitral. A este nuevo juicio convendrá aplicarle las reglas expuestas para el arbitraje internacional, y sólo deberá admitirse que durante el tiempo necesario para decidir la cuestión de nulidad, deba estar suspendida la ejecución de la sentencia arbitral.

BOOK REVIEWS

THE LAW OF WAR AND CONTRACT. *By* H. CAMPBELL.
London, Oxford University Press, 1918. Pp. xx, 365.

The author of this volume remarks that no field of English law has been so much affected by the recent war as the law of contract. Certainly no branch of the law has been more profoundly involved. This is so not only in England but in other belligerent countries, according to the degree of their industrial and commercial development. Had the subject been dealt with on general principles the results would not have been harmonious, since the rules prevailing in different countries reflect different conceptions of the effect of war on the relations of those who are generally termed enemies. But in the recent war there was an extraordinarily large number of statutes, proclamations, orders, decrees and regulations by which all sorts of relations were affected. These complex conditions, confusing alike to courts, to lawyers, and to commercial men, naturally gave rise to an enormous amount of litigation in which judges often groped their way to doubtful conclusions.

Mr. Campbell earned the gratitude of the legal profession by endeavoring to analyze the record, to systematize what had been done, and to furnish a guide for future action and interpretation. His work, as he states, grew from notes of his practice in Bombay. It first appeared in an Indian edition and later made its appearance in England. It embraces a survey of reported decisions down to August 1, 1919, with notes of decisions affirmed or reversed down to September 24, 1917. The work shows a firm and intelligent grasp of fundamental principles. The author's statements are clear, precise and compact. His thorough understanding of his subject has enabled him to deal with it in a comparatively brief compass, without omitting or slighting any material point. It presents an agreeable and useful contrast with the "timely" agglomerations of cases to which we are so much accustomed.

Reprinted from the *Columbia Law Review*, XX (1920), 117.

THE RENOVATION OF INTERNATIONAL LAW. *By* PROFESSOR DR. D. JOSEPHUS JITTA. The Hague, Martinus Nijhoff, 1919. Pp. xvi, 196.

The author proposes the renovation of international law on the basis of a "juridical community of mankind" as distinguished from the community of nations. He seems first to have conceived this idea in the study of what is variously called "Private International Law," "International Private Law," and "the Conflict of Laws," which is not international in the sense of being a law between nations, except so far as conventional agreements for the observance of certain rules have to a very slight extent made it so.

To extend this conception to what is properly called "International Law" evidently involves a radical change rather than a renovation. The author treats sovereignty as belonging to "mankind" and regards state sovereignty as admissible only as "an immediate tenure of mankind." Absolutely separating from international law the "positive law of war," the rules of which cannot, he affirms, be deduced from "reasonable principles of social life," he would bring everything else to the test of such principles. In order that he may not be called a "dreamer," he concedes that "the reasonable principles of social life are absolutely subordinated to the positive customary or written law," but he maintains, on the other hand, that they "are also the touchstone of the righteousness of the positive law and the final aim of its evolution," and that "a renovation of the international law" may therefore be founded on them.

To a certain extent the author ventures to furnish us with these invaluable criteria. As one might expect, they embrace rules which he himself regards as "reasonable." But our gratitude is often qualified by difficulty in following him. In discussing the thorny subject of frontiers, he observes that they have not been traced with regard to the general welfare; that conquest has been the main factor; and that, while "historical causality has weighed territorial and personal elements, Mars has thrown his sword into the scale, so that modifications may or may not have been in the direction of "reasonable principles." This leaves us on uncertain ground; and our perplexities are increased by the further remark that some assert that "the finger of the Almighty has traced the boundaries of states."

The author discusses the question of nationality, but offers no solution of its difficulties. The same thing may be said of his

treatment of the subject of envoys and consuls. Under the head of "the general direction of public affairs of mankind" he discusses "international administrative law," and in conclusion asks "May the germs of an evolution be ascertained?" He replies, "I am inclined to give an affirmative answer but the germs are very, very small, almost microscopic." So, in treating of conflicts in taxation, he remarks "Are there any germs of an evolution? They are to be found, but they are very, very small." Naturally, he does not fail to perceive the part played by patriotism in international affairs. The view he takes is that "patriotism, considered as a pleasant sensation," is "compatible with the paramount power of mankind."

These examples furnish an indication of the character of the author's thesis and of his method of presentation. More than half of the volume is devoted to topics in the domain of international private law.

Reprinted from the *Columbia Law Review*, XX (1920), 242-243.

A NEW PRINCIPLE OF INTERNATIONAL LAW. By A. M. M. MONTJIN. The Hague, Belinfante Bros., Ltd., 1919. 56 pp.

This monograph was prepared and apparently put to press a month before the signing of the Armistice in November, 1918. The end of the conflict not being then visible, the author recommended to the belligerents the adoption of "science" as the basis of an early and durable peace. By this he meant science applied in conformity with the principles of "anthropogeography." Ascribing international conflicts chiefly to the pressure of population in particular countries, he proposes to establish, as a new principle of international law, the "equality of density of population"; which is to be brought about by the periodical revision of national frontiers, say every fifty years, with such shiftings of population and migrations as may be necessary to the carrying out of the new principle. In Europe, for instance, France would extend (as she soon afterwards did) into Alsace-Lorraine; Germany, along the Baltic and into Poland; Italy, into the "unredeemed" territories; Austria-Hungary, into Roumania and Roumania into Bessarabia, while Serbia would get a port on the Aegean Sea.

In spite of the fact that the author warned the belligerents that the progressive movement of science was not to be arrested, and that all attempts to arrest it must unconditionally fail, the belligerents seem to have disregarded his advice, and

anthropo-geography yet remains to be incorporated in the international code. The author admits that "there are certainly difficulties attached to the application of the new principle," and that the "national migrations" connected with its application furnish "one great difficulty." This admission is altogether justified. In spite of earthquakes, fires and floods, men will return even to the devastated region which they consider their home and incur the risk of perishing in a like calamity. Writers have learnedly discussed the conflict between science and religion. The present monograph suggests a conflict between science and sentiment, with the odds enormously in favor of the latter.

Reprinted from the *Columbia Law Review*, XX (1920), 928.

THE GULF OF MISUNDERSTANDING; OR NORTH AND SOUTH AMERICA AS SEEN BY EACH OTHER. *By* TANCREDO PINOCHET. New York, Boni & Liveright.

Reprinted from *The Pan American Review*, II (1920), 23.

Mr. Pinochet has made an exceptionally illuminating contribution to the discussion of the relations between the United States and the countries of Latin America. A Chilean, temporarily in Chicago, is supposed to have addressed letters during the recent war to his wife in Chile. These letters, which commented freely and adversely upon the attitude of the United States towards the other independent countries of America, are supposed to fall into the hands of a woman, a native of Chicago, who was employed in the Censor's Department of the United States Government, and who, instead of holding the letters up, sent them to their destination accompanied with letters in the nature of a commentary written by herself. In this way Mr. Pinochet undertakes to present what he calls "the analysis of the shock between Latin America and Anglo-Saxon America," or a "dialogue of the two continents" or of "the two Americas." The author has, as he confesses, listened to this dialogue on both slopes of the Andes and on both sides of the Mississippi, and has classified and written down the things he has heard. The result is a candid and comprehensive presentation of different and conflicting attitudes and of the causes of the differences and conflicts.

By means of this method of discussion the reader is enabled to see and to grasp the complaints which each party to the misunderstanding may have made against the other. Much of the misunderstanding is no doubt due to a failure to recognize the

fact that the life of nations, just as the life of individual men, represents a blend of different objects, motives and inclinations. Briefly summed up, probably the chief complaint against the United States is that, in its relations with Latin America, its motives are essentially commercial and financial, and that its attitude is characterized by a grasping disposition and a want of sympathy. So completely are writers sometimes dominated by this impression, that one might suppose they would have us believe that the relations between Latin-American countries themselves have been peculiarly characterized by the absence of commercial and financial motives and by an abundance of mutual sympathy. It should be superfluous to say that the justification for such a belief is not to be found in actual conditions, either past or present, which the intelligent reader will readily recall. While, in the course of centuries, an individual may now and then renounce all material interests and devote himself to the founding of a faith, this is not the case with the general run of men; and what we find in the relations of the general run of men, we also find in the relations of independent states, without regard to race, color or language. Very often the bad opinion which one man holds of another, or which one nation holds of another, is due to the failure to take into account the universal complexities of human motives and of human transactions. The full and faithful presentation of such complexities peculiarly characterizes the present volume, which, by reason of its pointed and comprehensive exposition and comparison of different points of view, should materially contribute to the creation of a broader and sounder understanding between American countries.

THE CONTROL OF THE FOREIGN RELATIONS OF THE UNITED STATES¹

THE thanks of the Society are due to the members of the Committee on Award for the fulfilment of their responsible task, the performance of which not only involved the exercise of care, discrimination and judgment, but, because of the number and comprehensiveness of the essays submitted, was also exceptionally laborious.

Considering the manner in which the Committee on Award

1. Remarks in announcing the award by a Special Committee of the Henry M. Phillips Prize, American Philosophical Society, for an essay by Mr. Quincy Wright on the subject above mentioned, April, 1921.

has discharged its functions, I perhaps might be justified in regarding my present duty as ended. But in expressing to the author my own congratulations on his work and its results, I venture, as one who has been somewhat connected with the study and management of foreign relations, to advert to certain questions which profoundly affect the character of our government and our conduct as a nation, and whose importance transcends the bounds of individual opinion.

One of these questions relates to the extent to which what Dicey calls "constitutional understandings" are applicable to the determination of powers or of the exercise of powers under the American constitutional system. It has always seemed to me that so-called constitutional understandings are logically much more of the essence of things under the British system than under the American system. The difference may be likened to that which, in estimating the law-making force and effect of judicial precedents, exists between judicial decisions under the English common law and judicial decisions in countries whose law is fundamentally incorporated in codes which judicial decisions merely profess to interpret. My own investigations have led me to the conclusion that the weight attached to judicial interpretations in code countries is greater than is commonly supposed in England and the United States, while England and the United States give less effect to judicial decisions as law-making and law-fixing deliverances than even these two countries themselves generally suppose. Nevertheless, there is a clear logical distinction and also a clear practical difference between the law-determining effect of judicial decisions in the one class of countries and in the other.

Another question of vast importance in the United States is that of the extent to which treaties may be exposed to the objection of invalidity because they may be thought to conflict with the federal constitution. As no court, in spite of various disturbing *dicta* as to what conceivably might be done, has as yet actually held a treaty stipulation to be invalid on that ground, I will not now enter into the general question, but will only remark that, in the case of Dillon, the French consul at San Francisco, who claimed, under treaty stipulation, exemption from compulsory process as a witness in a criminal proceeding, it is altogether possible to maintain that the incident did not result either in the establishment or admission of the "international" validity of a treaty where constitutional validity was lacking or in the demonstration of any conflict between the particular treaty and the constitution. Whether France had or had not been "informed" of the treaty-making clause of our constitution seems to be a matter of little conse-

quence. This point could easily be met by handing a copy of the constitution of the United States, together with a few sets of commentaries, to foreign representatives as a preliminary to negotiation with them. The truth is that, although no one has a profounder respect for Marcy's opinions than I have, I do not think we are obliged to accept his contention, which was not in fact carried through, that the immunity from compulsive process as a witness, secured by the treaty, was in conflict with the VIth Amendment to the constitution. Conventional exemptions of that character had from time immemorial been common, and we are no more obliged to admit that the VIth Amendment was or is infringed by them than we are obliged to admit that it has been or is now violated by the immunity from judicial process accorded to diplomatic officers.

In regard to what the author of the essay, following the phraseology so often employed, discusses under the head of "congressional delegation of power to make international agreements," I have long, indeed I may say always, been inclined to think that no "delegation" of power whatever is involved in the matter. As Congress possesses no power whatever to make international agreements, it has no such power to delegate. All that Congress has done in the cases referred to is to exercise beforehand that part of the function belonging to it in the carrying out of a particular class of international agreements. Instead of waiting to legislate until an agreement has been concluded and then acting on the agreement specifically, Congress has merely adopted in advance general legislation under which agreements, falling within its terms, become effective immediately on their conclusion or their proclamation.

With regard to the control of the foreign relations of the United States by the federal government, the question whether such control is exclusive or is divided with the state governments reaches down to the very foundations of our constitutional system and of the standing, unity and power of the United States among the nations of the world. In this relation the view that, in the international sphere, powers may be ascribed to the government of the United States on the grounds of "sovereignty," and the view that all federal powers must be derived from the constitution either expressly or by implication, do not necessarily lead to contradictory results. Personally, I do not hesitate to avow the opinion that all foreign-intercourse power in the United States is conferred upon the national government by the constitution, either expressly or by implication. I am thus prepared to meet the partisans of "delegated powers" on their own ground, and in so doing am able to

invoke the authority of an eminent judge who is not usually charged with recreancy to states' rights theories. I refer to Chief Justice Taney, who, in the case of *Holmes v. Jennison*, 14 Peters, 540, as early as 1840, declared: "All the powers which relate to our foreign intercourse are confided to the general government." If, said Taney, any power of that kind remained to the States, then every State of the Union must determine for itself the principles on which it would exercise the power, and there would in the end be "no restriction upon the power but the discretion and good feeling of each particular State." Nor did Taney stop here. While admitting, as he said, "that an affirmative grant of a power to the general government is not of itself a prohibition of the same power to the States, and that there are subjects over which the federal and state governments exercise concurrent jurisdiction," he yet declared: "But, where an authority is granted to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant, there the authority of the federal government is necessarily exclusive; and the same power can not be constitutionally exercised by the States." Such was the process of interpretation by which Taney reached the conclusion already quoted.

There is yet another question to which I feel obliged to advert, and that is the question of the President's power to use force in our foreign relations. By the constitution of the United States the power to declare war is vested in the Congress. Sometimes orators and writers speak of "recognizing the existence of a state of war," as if this differed from declaring war; but the co-existence of the two phrases may be ascribed to motives of political strategy rather than to any belief or supposition that they denoted different legal conceptions. In reality the word "war" comprehends two meanings. It denotes (1) acts of war, and (2) the international condition of things called a "state of war." Acts of war do not always or necessarily develop into the general international condition of things called a state of war, but they are nevertheless war and involve the "making" of war in a legal sense. The fact is notorious that in many instances hostilities or war *de facto* have long preceded the formal declaration of war, and that when the declaration was made it was regarded as relating back to the time when hostilities began. As was shown by Lieutenant Colonel Maurice, of the British War Office, in his *Hostilities Without Declaration of War*, published in London in 1883, there were less than ten clear instances in the hundred and seventy-one years, from 1700 to 1870, inclusive, where a declaration of war preceded

hostilities or the actual making of war. This served to kill the project then pending for the building of a tunnel under the English Channel between Great Britain and France.

There can hardly be room for doubt that the framers of the constitution, when they vested in the Congress the power to declare war, never imagined that they were leaving it to the executive to use the military and naval forces of the United States all over the world for the purpose of actually coercing other nations, occupying their territory, and killing their soldiers and citizens, all according to his own notions of the fitness of things, so long as he refrained from calling his action war or persisted in calling it peace. I will take the specific case which the author of the essay mentions of the capture and occupation of Vera Cruz in April, 1914, by the forces of the United States. The author discusses the question whether this was to be considered as an act of war or as "making war." Sometimes it is helpful to visualize a question by bringing it home to ourselves. Let us suppose that some foreign power, for instance, Great Britain, or France, or Germany, feeling dissatisfied with the form of apology tendered by us for a temporary interference the week before with the movements of one of its consular or naval officers in the United States, should by military force attack and seize the port and city of Philadelphia, take control of Broad Street station and the Pennsylvania railroad, set up a military administration at the City Hall, and, using as a seat of custom the historic edifice (Independence Hall) in which we are now assembled, proceed to collect national duties and local revenues. How would this strike us? Should we gently dream that the power committing these acts of hostility was exemplifying the arts and processes of peace? In reality an affirmative answer would confound all our conceptions, moral as well as legal. Such acts would necessarily strike a Frenchman, a German, a Japanese, a Mexican, or any other human being, lawyer or layman, learned or unlearned, at home, in the same way, as acts of war, and he would not be wrong. The Greytown incident, which has often been cited to prove that such a proceeding would not be war or an act of war, can not properly be invoked as a precedent, since Greytown was a community claiming to exist outside the bounds of any recognized state or political entity, and the legality of the action taken against it was defended by President Pierce and Secretary Marcy on that express ground. It should also be superfluous to remark that the fact that the government of the United States, although it had continued to maintain diplomatic intercourse with the Huerta government, had not formally recognized it, is altogether irrelevant. One nation can not divest another of its

rights and immunities as an independent state by withholding formal recognition from its government.

There is yet another matter to which I venture to advert, and that is the enormous increase within the past six or seven years of the number of publications relating to international affairs. The notoriously high cost of printing does not seem to have operated as a check on what may in industrial phrase be called the output. But this perhaps is not the worst aspect of the matter. A vast deal of what has been published is scientifically worthless, and, to uncritical readers, harmful. It may therefore be said that one of the most serious questions that now confronts an author is that of how to treat, or whether to cite as authority, titularly pertinent publications which, although they may be found on the shelves and in the catalogues of our larger libraries, are incompetently written and essentially misleading. Such a condition of things increases an author's burdens, even though he be inclined, as I personally think he should be, to apply a proscriptive rule, and to refrain from citing such publications, unless for correction or reproof.

In conclusion, I desire again to congratulate the author of the Crowned Essay on the results of his work, and I have great pleasure in presenting to him the substantial token of his success.

THE LIBERATOR SIMÓN BOLÍVAR¹

GENTLEMEN:

When I first visited Switzerland, the land proudly holding among existing nations the oldest title to the name "republic," among the first things to attract my attention were the signal stations in the mountains. Situated among powers accustomed to war with one another, Switzerland long ago received by common consent, in order that her independence might be preserved, a guaranty of perpetual neutrality. But her hardy and patriotic people, bearing in mind the struggles and the sacrifices by which their independence was won, have never ceased to be alive to the fact that no nation is safe against attack. Hence they have established and maintained an admirable sys-

1. Address at luncheon given by the Pan American Society to the Venezuelan Special Mission and delegates of other American Republics, at the Hotel Astor, New York, April 20, 1921. Reprinted from *The Pan American Review*, April, 1921; *International Conciliation*, Inter-American Division, Bulletin No. 25 (1921).

tem of defense, and have erected in the mountain tops stations from which the signal of danger may be flashed throughout the land; and as I reflected on the significance of these stations, I came to think of them as beacons of liberty.

In the spiritual life of man and in the domain of political thought and action, these signal stations have their analogues. As we survey the past and raise our eyes to the summits of human endeavor, we see standing before us on the mountain tops the great figures who have borne the torch of liberty. In their time they were the leaders of men, carrying to oppressed peoples the call to emancipation and beckoning them on to a new freedom and a higher destiny.

The name of such a leader is on all our lips today. His unveiled statue, standing in the midst of this populous city, will serve to remind the myriads that behold it, not only of his physical form and appearance, but, even more, of his immortal political legacy to the world and especially to the western hemisphere.

The test of a man's fidelity to a faith is his readiness to suffer for it and his capacity to cherish it in adversity. The air today reverberates with the name of Simón Bolívar, because of his triumphant endurance of this supreme test. Defeated in his earliest efforts and even driven by hostile metropolitan forces from the native soil he loved so well, he bore with fortitude the hardships of exile and of poverty, and, confident in the ultimate issue, persevered in the struggle until he became the recognized champion of a victorious ideal.

We have often heard of the prophetic letter that Bolívar wrote, more than a hundred years ago, when hopes for the future were most downcast, and the cause seemed almost lost. But, familiar as we may be with this celebrated utterance, I venture again to mention it and to repeat some of its terms. It is one of the privileges and immunities of eternal truth that it bears constant repetition. As, in the domain of religion, the four gospels are to be read every day and always heeded, so, in the domain of politics, the gospel according to Simón Bolívar, like the gospel according to George Washington, and—let me also say—according to that great North American protagonist of South American independence, Henry Clay, is to be read daily and practised for all time.

Bolívar spoke not only for the moment, but also for all future ages, when he declared:

The destiny of America is irrevocably fixed; the tie that unites her to Spain is cut. . . . Because successes have been partial and fluctuating, we ought not to lose confidence in fortune. In certain places the upholders of independence triumph; while the tyrants obtain ad-

vantages in others. And what is the result? Is not the New World vigorous, aroused and armed for its defense? We glance about us and we see everywhere a light throughout the immense extent of this hemisphere.

The light that the heroic exile, piercing with prophetic eye the gloom then enshrouding the political horizon, saw fitfully flaming, continued to burn and to glow until it illuminated with its radiance the entire western hemisphere.

But Bolívar was not thinking of the founding of vast territorial empires or solely of material things. He estimated the greatness of nations, as he declared, "not so much by reason of extent and riches as by reason of liberty and glory." And among his cherished visions was that of an international congress that should deal with the highest interests both of peace and of war. It was this conception that led him to convoke the congress of Panamá, which, although it failed to attain its immediate object, proved to be the progenitor of the habit of friendly and fraternal conference among the American nations.

At the time when Bolívar wrote and wrought, the minds of men were still aglow with the precepts of political liberty that characterized the second half of the eighteenth century and continued to produce rich fruitage in the nineteenth. Among the ideas then preached by philosophers and that were coming to be accepted by statesmen, was that of the legal equality of independent states. Among the works on international law by which intelligent thought was then most influenced, none has been more frequently cited or more widely read than the treatise by the famous Swiss publicist Vattel. In a well known passage, this celebrated writer, speaking of nations as bodies of free persons "naturally equal" and inheriting from nature "the same obligations and rights," declared: "Power or weakness does not in this respect produce any difference. The dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom." Our own great chief justice, John Marshall, who had been a soldier of the American revolution, espousing this principle in its entirety, declared, in an oft quoted judicial opinion: "No principle of general law is more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights."

This principle, of the equality of all sovereign states, in the eye of international law, was the very foundation of American policy, both to the north and to the south.

It must be confessed that among men practice never completely squares with professed principles. Not only are principles often difficult of application, but their application is frequently disturbed and thwarted by human passions. But there

stands today to the credit of the American nations the distinct achievement—through international conferences in which differences of power or of weakness are not recognized—of a voluntary system of coöperation in the development of the arts of peace. It was my good fortune to be present at the first meeting of the first of the assemblies distinctively known as the “international American conferences,” and to listen to the eloquent salutatory of Mr. Blaine, when he called upon the delegates to

show to the world an honorable, peaceful conference of . . . independent American powers, in which all shall meet together on terms of absolute equality: a conference in which there can be no attempt to coerce a single delegate against his own conception of the interests of his nation; a conference which will permit no secret understanding on any subject, but will frankly publish to the world all its conclusions; a conference which will tolerate no spirit of conquest, but will aim to cultivate an American sympathy as broad as both continents; a conference which will form no selfish alliance against the older nations from which we are proud to claim inheritance; a conference, in fine, which will seek nothing, propose nothing, endure nothing that is not, in the general sense of all the delegates, timely and wise and peaceful.

It was during the sessions of this conference, whose lofty and benevolent purposes were thus proclaimed that the phrase “American powers” was changed to “American republics,” through the transformation of the great empire of Brazil into the great republic of the United States of Brazil. In the succeeding international American conferences, as well as in other international conferences—scientific, educational and financial—the spirit of sympathy and neighborliness has been cultivated, expanded and revived.

With the cultivation and expansion of this spirit and with the preservation of that unity of purpose and harmony of action by which it is animated, the future of America, with its boundless resources and boundless opportunities, challenges the farthest reach of the imagination; and as the American nations grow in riches and in power, let us see to it that they continue to cultivate the spirit of liberty, justice and respect for national rights and obligations, and to regard the preservation and perpetuation of that spirit as their highest and greatest glory. It is to thoughts such as these that the present occasion owes its existence; and, standing in the presence of the special mission from the native land of Simón Bolívar, and of the other American republics, let us dedicate ourselves anew to the consummation of the exalted ideal that has given to the name “America” its distinctive place and its noblest meaning in the history of the world’s progress.

IMMORTAL YOUTH¹

WE celebrate to-day the first hundred years of the immortal youth of the University of Virginia. While a university may gather years, it should never grow old. Neither with its name nor with its work should the thought of death or of feebleness be associated. So far as it is subject to the influence of mortality, the things that pass away should be regarded not as lost but merely as fructifying the soil for a richer and more abundant harvest. Thus it is that in the highest sense death is swallowed up in victory, and that, so far as concerns the university, we should conceive of the flight of years as a perpetual resurrection to a new, a higher and more useful existence.

Approaching the hundredth anniversary of the University of Virginia in this spirit, we look not only to the numbered past but also to the boundless future. As we halt for retrospection, our minds are filled with fond and grateful recollections; and if we say, in the words of a great orator, that the past at least is secure, we repeat his words in no spirit of despondency. On the contrary, surveying what has gone before, we feel the spell of the immortality which we ascribe to our Alma Mater. We think of the devoted men who in our youth sought to light us along the path of life and to point us toward the high destiny which by our own efforts we might achieve. They loom before us as the sages, the wise and pious mentors, of our earlier years, who explored the past in order that they might furnish us with the lessons of its experience. We recall them as men of ripe learning, of exemplary character and of lofty purpose, who lived not in order that they might glorify themselves but in order that the world might be better for their having lived in it.

Nor, when we recur to recollections such as these, are we stirred merely by the associations of sentiment. We are concerned with the very substance of things, with the vital essence of the university's life and power. To-day we witness the widespread appropriation, by many and varied non-academic vocations, of the professorial title; but, although this may be re-

1. Address at the Centennial of the University of Virginia, June 2, 1921. Reprinted from the *Alumni Bulletin of the University of Virginia*, XIV (July-August, 1921); *The Nation*, CXIII (July 13, 1921).

garded as a recognition of the title's past renown, it does not contribute to its present prestige. Meanwhile, in the promiscuous strut of titular distinctions, which, by enabling the wearer perchance to gain an undeserved credit, may occasionally serve even as a cloak for imposture, the bewildered public is too prone to lose sight of the dignity and importance of the function of the teacher. Who should not be proud to think of himself simply in this character? To be a teacher of men not only is one of the noblest, but is one of the most responsible and most sacred of all callings. For the teacher may justly feel that, while he lives for the present, the knowledge he imparts, and the principles which he inculcates, are the things by which the future of the world is to be shaped.

Therefore, while I have spoken of the masters who filled the chairs of this university in my own youth, I wish also to pay my tribute to the devoted men who are upholding the traditions and carrying forward the task of the university to-day. Their lot has not been an easy one. It may, indeed, be said that the quick changes and wide fluctuations in our later economic life have been felt in the universities with special severity. Moreover, the spirit of competition has invaded even the academic sphere. Methods formerly adequate have had to yield to new demands. Changes in organization have proved to be requisite; and fortunate was the University of Virginia, when, the easy democracy of its earlier administration succumbing to the exigencies of the times, it secured, as its executive head, one who combined, in so large a measure as its first president has done; the qualities of character, patience, wise foresight and real eloquence. He and the loyal men gathered about him have borne their burden and performed their task in a manner worthy of their predecessors, and in a devout spirit of self-forgetfulness that entitles them to the eternal gratitude of the commonwealth. No provision that could be made, for them and for their successors in office, either by the state or by private benefaction, could exceed the measure of their merit or the just reward of their efforts to maintain, to perpetuate and to advance the cause of sound learning and public service.

I have referred to the life of the university as one of immortal youth. This necessarily implies that the university must be progressive. No man, no state, no nation can stand still and maintain its place in the world; nor does any man, any state or any nation deserve to hold its place in the world that is content with what has been achieved. Mere contentment with the past, no matter where we find it, means decay; the so-called happiness that springs from placid satisfaction with things as

they are, or with exaggerated worship of things as they have been, is essentially spurious and is not a blessing but an evil. Man was born to labor. For this purpose he possesses his faculties, and if he hides them or permits them to remain unused he justly incurs the sentence cast upon the unfaithful steward who lost not only the opportunity for profit but even his original store.

As perpetual vigilance is the price of liberty, so perpetual struggle for higher and better things is the price that must be paid for the immortality of the university. But, in striving for immortality, what are the things for which the university should stand before the world?

I have mentioned the word "liberty." Like all things else, this is a relative concept. All mundane things are subject to human conditions; and, in spite of all efforts to formulate precise definitions, we are never able to find one that is permanently satisfactory. Nevertheless, there is such a thing as liberty, of the absence of which, if we lack it, we very quickly become conscious. In its essence, liberty means freedom of self-development, and this freedom is to be allowed as far as the absolute safety of society will permit individuals to determine for themselves what they will or will not do. The university should, therefore, stand for liberty, meaning the widest possible freedom of thought and of action. By no statesman or philosopher has this principle been more luminously expounded or more clearly exemplified than by the founder of the University of Virginia. Perhaps one may say that if he had been called upon to designate the one great principle to the inculcation of which the institution which he had founded should through all future time be devoted, he would have designated the principle of human liberty.

This necessarily leads us to another thought, and that is the principle of toleration. To-day we are living in a world still racked by the passions resulting from a great war. Human beings, instead of loving one another, have been fighting and killing one another. This is a condition into which the world, as long as we have known it, has from time to time fallen; and at such junctures, confidence being supplanted with suspicion, there is a tendency to regard differences of opinion as a menace and as something to be suppressed. We should ever be on our guard against this tendency, alike in society, in politics and in religion. To-day our eyes and ears are constantly assailed with wholesale attacks upon persons of a particular faith or a particular creed, attacks which, if not inspired by passionate excitement, would be regarded as purely wanton. Such things can only be deplored as manifestations of human traits which

fortunately are manifested chiefly under abnormal conditions.

In antithesis to the principle of toleration, I venture to mention another word which has come to be characterized by base associations. I refer to what is now popularly known as "propaganda" signifying in effect the systematic dissemination of falsehoods or perversions for political, commercial or other selfish purposes. The world is to-day rife with this sort of activity, which is by no means confined to the perpetuation of bitterness by and between nations that lately were enemies. Stimulated by the war into abnormal activity, and now practiced more or less by all against all, it seeks, with frenzied and unscrupulous zeal, in an atmosphere of universal suspicion, to permeate all the relations of life and to create and foster ill-will among all nations, including even those supposed to be friendly. Scarcely can one attend to-day a gathering for the discussion of public questions, without being treated to the pernicious productions of this vicious system, which, finding their way into the press and into books ostensibly genuine, are glibly rehearsed by persons whose position and profession should cause them to exhibit a greater sense of care and of responsibility.

A university, as a seat of learning, should set its face against such methods. One of the chief glories of the university is the fact that it is a place devoted to the search for truth. A great philosopher, whom I read in my student days, declared that, if the truth were placed on the one hand and the search for truth on the other, and he were asked to choose between them, he would take the search for truth as the sublime quest of his life. Such is the spirit of aspiration, such the insatiate longing for what is true, beautiful and sincere, that must animate the university, if it is to justify the attribution to it of the thought of immortality.

The word propaganda has, however, been associated in times past with a type of thought and of action altogether different from that which has lately made it repulsive. Some years ago, in the city of Buenos Aires, I saw a volume which one could not touch without feeling deeply moved. It was a copy of a translation of the Bible, into a dialect of the Misiones territory, by some of the fathers, agents of the *Congregatio de Propaganda Fide*, who bore Christianity to the aborigines of that then remote and almost impenetrable region. Not only did they make the translation, but they printed it in the wilderness at a place even the site of which is to-day unknown. This they did to save men. In their holy zeal to carry salvation, according to their belief, to unknown lands, they shrank neither from peril nor from sacrifice. As we think of their helpless separa-

tion from the haunts of civilized life, of their self-denial and their days and nights of solitary toil, we are lost in admiration of the men who wrought such a token of their faith and of their love for their fellow-beings. Could there be a more inspiring example for those who accept a teacher's sacred trust?

There is still another thought that rises in the mind in connection with the University of Virginia and its future. We are accustomed to think, and are, as I believe, justified in thinking of the University of Virginia as the first real American university; but it cannot be affirmed that this claim has been universally conceded; and it is proper to say that the claim rested not so much upon assumed superiority of instruction as upon the exemplification in the university's curriculum of the principle of freedom of individual choice and the pursuit of studies along the lines of one's individual preferences and aptitudes. Up to a comparatively recent time, however, the University of Virginia was universally admitted to be the first university of the South. This position it can hardly expect to hold in the future in the same uncontested sense as in the past. Other universities have sprung up in the South, and, receiving generous support from public and from private benefaction, have developed an active and robust life and have come to figure as vigorous rivals.

Nevertheless, the University of Virginia to-day educates within its halls students from all quarters of the globe, and I love to think of it not only as a State institution but as an institution which is to fill a distinctive place in the life of the nation and of the world. For the discharge of this exalted function it needs vastly increased resources; but it also possesses an inestimable advantage which mere material accessions cannot give, and that is the influence of its memories and traditions, and of its association with the name and fame of its founder, the great apostle of modern democracy.

On an occasion such as this, when we bring to the shrine of our Alma Mater our inmost thoughts, an expression of personal feeling may not be out of place. In my childhood there were two names which I was taught peculiarly to revere. These were the names of Washington and Jefferson; one the author of the Declaration of Independence, and the other the chief architect of the nation. Subsequently it fell to my lot for a number of years to occupy a public office from which, whenever I looked out of the window, I saw the Washington monument and the ever-moving current of the Potomac; and as I gazed upon the silent memorial pointing to the sky, and dwelt upon the character, the wisdom, the self-control of the first President of the first American republic, I wondered whether

the time might not come when the world, recalling, in the words of Poe, "the glory that was Greece and the grandeur that was Rome," might say that in the nation whose independence Jefferson declared and Washington established that glory and that grandeur were combined and magnified. And then, as I gazed upon the ever-moving, ever-widening stream, under the ever-changing skies, it seemed to typify the endless flow of the life of the nation, finding its way to the ocean and permeating the farthest reaches of the boundless sea of human endeavor. So let us think of the immortal youth of the University of Virginia, ever flowing on, ever broadening, and permeating the intellectual and moral life of the world.

In the ceaseless, endless flow of its intellectual and moral influence, the university both conserves and creates. Tennyson spoke of his generation as "the heir of all the ages, in the foremost files of time." In a sense no saying could be more fallacious or more misleading. As he who would be first in the Kingdom of Heaven must become the servant of all, so the first requisite of knowledge is a spirit of humility, such as renders us willing to learn. The potentialities of heirship are severely limited by human conditions. We all begin life in the same helpless way, dependent on others for existence and physically and mentally groping about. But, as we grow older, and become more self-conscious, we are perhaps not over-respectful of the wisdom of the aged. Indeed, even if it be liberally conceded that we know the causes that previously produced certain ill-effects, we are disposed to believe that their similar operation may be averted in the present instance; and, obedient to our possibly uninstructed impulses, we proceed to try our own conceptions of what is wise and expedient. The assumption, then, that we are the heirs of all the ages, representing the farthest human advance, should not be unduly encouraged. Such an attitude is essentially hazardous, and, if inadvertently indulged, tends recurrently to subject the world to the loss of a large part of its garnered treasures.

For the prevention of such loss, we look to our seats of learning. While the university conserves the teachings of the past, it also uses them for the profit of posterity. In its quiet halls of study and reflection, overconfidence is chastened, so that uninformed aggressiveness may neither mar the present nor embarrass the future. The impulses of youth are refined and wisely directed. The mind is fertilized. Ideals are raised. Ambition is stimulated; and in endless train there issues from the gates the eager procession of intelligent builders by whom institutions are competently fashioned. Society and the state are the gainers; life itself is dignified and ennobled. Rejoicing,

then, in our university as the perpetual dispenser of priceless benefits, let us strive to maintain and strengthen it with all the resources at our command, placing above its portals the words, "Conserver of the Past, Creator of the Future."

BARTOLOMÉ MITRE¹

WHEN Thomas Jefferson, the great apostle of modern democracy, came to prepare the epitaph that should be inscribed on his tomb, he omitted all titular honors and official distinctions, including even the presidency of the United States, and wrote: "Author of the Declaration of American Independence, of the Statute of Virginia for Religious Freedom, and Father of the University of Virginia." In making this selection, Jefferson exemplified the prophetic instinct of his sagacious mind. Of the influence of the famous Declaration, not only in the Americas but throughout the world, all subsequent time has been but the witness. Religious freedom, keeping pace with the progress of national independence, has continued to grow; and, within the present month, there has been celebrated the first hundred years of the beneficent existence of the unique university to which the founder gave the last efforts of his life.

Through the remarkable combination of achievements thus recorded there runs a consistent thought, not only appropriate to the present occasion, but essentially the same as that by which it is inspired. The highest gift of man to man is a great thought embodied in an institution by which it is perpetuated and rendered fruitful. In celebrating today the hundredth anniversary of the birth of Bartolomé Mitre, we commemorate the life of a man who stands out in history as having made such a gift. Writers have furnished us with phrases by which his achievements are denoted. He is described as a general, a politician, a journalist, and an author. These titles serve to indicate his diversified activities. But through all his activities, whether as soldier, as statesman, as journalist, or as author, there runs the dominant thought which he bequeathed to his countrymen and to the world as the founder of the constitutional unity of the great country called the Argentine Republic.

1. Address delivered at the meeting held by the Hispanic Society of America, New York, June 24, 1921, in celebration of the hundredth anniversary of the birth of Bartolomé Mitre, June 26, 1821. Reprinted from *Hispanic Notes and Monographs*.

The beginnings of political independence, like the beginnings of life itself, merely mark the ushering into the world of a new entity whose survival and growth depend upon its capacity to breast the storm and stress of circumstances and to triumph over the mutations to which all human things are subject. Surveying the history of the past hundred years, we find it to be a fact that none of the independent countries of America has escaped a struggle with disruptive tendencies. In one form or another, all the American nations have had to pass through the ordeal of civil war.

The old Argentine confederation, like the original confederation of the United States of America, proved to be inadequate. It remained for Bartolomé Mitre to lead the way to the establishment of the Argentine nation; and when, in 1862, the old confederation was dissolved and the present national constitution was adopted, he was logically chosen as the first President under it.

Nearly ten years before this happy consummation, Bartolomé Mitre founded at Buenos Aires the journal which, by its title *La Nación*, still proclaims the great conception to the realization of which he devoted his life. This model journal is now conducted by the third generation of those bearing its founder's name, and, had he done nothing else, its establishment would have entitled him to a lasting debt of gratitude. Not only is it a great newspaper, but, conceiving its function to be something broader and better than the purveyance of all the news of the day, whether fit or unfit to print, it daily exhibits in its pages the proofs of that high sense of responsibility which has made it a means of education, a preserver of standards of taste and of morals, and a beneficent public institution.

Surveying today, as living witnesses, the great work which Bartolomé Mitre wrought, we unhesitatingly pronounce it good. We see in the Argentine nation not only a prosperous and progressive state, but also a virile political community little inclined to sink its individuality in a confused conglomerate of imitative mediocrity. Possessed of ideals of its own, it has not passed out of that state of self-consciousness which makes a nation believe in its own destiny and in its capacity to contribute something of value to the world by a legitimate adherence to its own conceptions of national conduct. On the other hand, Argentine statesmen have often substituted for the phrase "America for the Americans" the sentiment "America for humanity." In the vast reaches of the national domain, millions of human beings have found, and millions more are yet to find, the rewards of industry and thrift under favoring skies and liberal institutions. It was for national greatness, in this highest and

best of all senses, that Bartolomé Mitre wrought. Judged by time, that "wisest counselor of all," the wisdom of his aims and the integrity of his purposes stand demonstrated. In acclaiming him, therefore, as welder of the Argentine nation, we hail his work as a contribution not only to the happiness of his people, but also to the world's advancement.

THE MONROE DOCTRINE¹

ABOUT twenty-five years ago, as the Venezuelan boundary question was looming large on the horizon, a man then eminent in the business world asked me to tell him in five minutes what the Monroe Doctrine meant. He explained that he made his inquiry in that precise form because he had just five minutes to give to the subject, and no more. I promptly replied that I probably could answer his question more effectively in five seconds than I could in five minutes, since, if I really began to talk on the subject, I might consume five hours; but that I would at once say, without further loss of time, that the Monroe Doctrine meant "America for the Americans." Perhaps I also added that this sententious phrase was to be interpreted in a political and not in an economic sense.

The so-called doctrine enunciated by Monroe was a rule of policy growing out of the fundamental principles which the founders of the government of the United States laid down for the guidance of its foreign policy. The first of these principles was that of non-intervention in the political affairs of other governments and particularly of the governments of Europe. John Adams, while engaged in negotiating the treaty that acknowledged our independence, recorded in his diary that Mr. Oswald, the British commissioner, rather taunted him one day with being "afraid of being made the tools of the powers of Europe." Adams bluntly answered, "Indeed I am." "What powers?" asked Oswald. "All of them," declared Adams, and in explanation added:

It is obvious that all the powers of Europe will be continually maneuvering with us to work us into their real or imaginary balances of power. They will all wish to make of us a make-weight candle, when they are weighing out their pounds. Indeed, it is not surprising; for we shall very often, if not always, be able to turn the scale. But I think it ought to be our rule not to meddle.

1. Reprinted from *The Annals of the American Academy of Political and Social Science*, No. 1533 (July, 1921).

Of all the sages of the American Revolution, John Adams, with the single exception of Benjamin Franklin, had the most comprehensive diplomatic experience. The prophetic words above quoted were uttered in 1782. More than a quarter of a century later, Adams, in his *Patriot Letters*, reaffirmed the principle which he had expounded to Oswald. Speaking of the "public negotiations and secret intrigues" which the principal powers, and particularly the English and the French, had, as he said, for centuries employed in every court and country of Europe to influence and sway the course of governments, he declared that, so long as they might hope to seduce the United States to engage in their conflicts, the country would be "torn and convulsed by their maneuvers"; and, with the wreck of the French alliance still fresh in his mind, he further declared that the United States should make no treaties of alliance with any European power but should separate itself so far as possible and so long as possible from all European politics and wars.

Washington, in his Farewell Address, and Jefferson, in various utterances, official and unofficial, enjoined upon their fellow-countrymen the observance of the same rule. But these injunctions were but the solemn testamentary affirmations, by the chief builder of American independence and the author of its Declaration, of their profound conviction that abstention from interference in European politics was the very life of the American system of non-intervention and neutrality, the foundations of which they felt that they had, as President and as Secretary of State, in 1793, securely laid.

Monroe's famous declaration, which was directly occasioned by a movement on the part of a league of European powers called the Holy Alliance, to extend its activities to the Western Hemisphere, was conceived to be justified by the then firmly established American policy of non-interference in the affairs of Europe. "Our first and fundamental maxim," said Jefferson, "should be never to entangle ourselves in the broils of Europe; our second, never to suffer Europe to intermeddle with cis-Atlantic affairs." These rules were understood to be not only correlative but interdependent.

The Monroe Doctrine was announced by the United States as a rule of policy, and not as an international understanding. The European powers were not asked to agree to it. Had it been incorporated in a treaty, the terms of the agreement evidently would have been to the effect that, in consideration of the abstention of the United States from interference in the politics of Europe, the powers of Europe would engage to abstain from interference in the politics of America. But it was never protocolized. The fact that on certain occasions, such as that of the

signing of the Hague Conventions, the United States has made the Monroe Doctrine the subject of a reservation, merely denotes that the United States in becoming a party to certain non-political engagements, has done so with the express understanding that it was not to be regarded as having yielded its traditional policy and that the engagements were not to be interpreted as having that effect.

Among the many vague and indefinite suggestions to which the excitements of the past few years have given rise, none is more elusive than the proposal to extend the Monroe Doctrine to the world. In only one sense can this phrase have any meaning whatsoever. John Quincy Adams, in his musings on the Monroe Doctrine, speaks, in his diary, of the right of the independent countries of America to work out their political destiny in their own way. Had Adams been proposing generally to safeguard the rights of all nations, and not simply to safeguard the Americas against threatened old-world aggression, this might have been taken as an affirmation of the general right of national self-determination. But to say that the United States, because it undertook to safeguard the Americas, should, either singly or in combination with other powers, undertake to secure the enjoyment of the right of self-determination to all nations, including those of Europe, would be not only to pervert Adams' meaning but to discard the Monroe Doctrine altogether and to substitute for an American policy a world policy.

Nor is the fact to be overlooked that the Monroe Doctrine never was regarded by its authors as guaranteeing the independence and sovereignty of American nations as among themselves. On the contrary, the principle of non-intervention and neutrality, in association with the principle of the legal equality of independent states, was proclaimed and practiced by the United States as furnishing its rule of conduct in its relations with other independent American countries as well as with the rest of the world. This, again, serves but to demonstrate that no matter how we turn, reciprocal non-interference by Europe and America in each other's politics was accepted as the distinctive and vital essence of the Monroe Doctrine.

Of the observance of the Monroe Doctrine, one of the results has been the growth of an American system, the central thought of which is expressed by the word Pan-Americanism. What we call Pan-Americanism is the outgrowth of the conception that there is such a thing as an American system, and that this system is independent of and different from the European system. In this relation I ventured to say, in a work published before the idea of a world-league had come to occupy an appreciable place in the public mind, that to the extent to which

Europe should become implicated in American politics and America should become implicated in European politics, this distinction would necessarily be broken down and the foundations of the American system impaired; and that "to the extent to which the foundations of the American system were impaired, Pan-Americanism would lose its vitality and the Monroe Doctrine its accustomed and tangible meaning."

I have seen no occasion to modify these statements, which may, I think, fairly be regarded as truisms. The question whether the United States should continue to adhere to the Monroe Doctrine or should abandon it in favor of some other policy, is, like other political questions, a legitimate subject of discussion. But it is desirable that the discussion should be conducted with a frank recognition and intelligent appreciation of the fact that the Monroe Doctrine is distinctively American both in its origin and in the sphere of its operation; that non-interference in European politics was and has continued to be its source, inspiration and justification; and that the title can not be applied to policies involving participation in world-politics without discarding its actual and distinctive meaning and perverting it to fanciful uses in unknown realms.

THE PERMANENT COURT OF INTERNATIONAL JUSTICE¹

PARAPHRASING the words of Shakespeare, we may say that some are born to honor, that some achieve honor, and that some have honor thrust upon them. Speaking of myself, which is by no means a grateful task, I may say I do not feel that I fall wholly within any of the three foregoing categories. It was said of a certain rich man, that he had worked hard and lived within his income, thus increasing his store and assuring himself against failure. This is as far as I am willing to go in claiming credit of any kind for myself. But surely this simple, homely plea would not account for the demonstration of which I am the object tonight.

This honor I feel that I owe in large measure to chance. Nothing that I have done or am capable of doing would alone

1. Address at the dinner given by the Pan American Society of the United States at the Plaza Hotel, New York, December 5, 1921, on the occasion of Mr. Moore's election as a Judge of The Permanent Court of International Justice. Reprinted from *The Pan American Review*, Vol. II, No. 13 (December, 1921), 10-19.

account for it. We must seek another explanation, and this explanation is found in the fact that I have lately had the good fortune to become distinctively associated in a public capacity with an ideal inspired by the highest human hopes and aspirations.

Less than a month ago the world woke, as if from a despondent and haggard sleep, to find itself suddenly elated by the startling proposal presented by the Secretary of State of the United States, in words of earnest eloquence, to the conference called for the limitation of armaments. It had seemed as if mankind, oppressed with the stifling miseries of war, had despaired of greeting again the radiance of the dawn and breathing freely once more the morning air. But, out of the night, there seemed to come an unexpected summons, and a sign that made the horizon effulgent with light, because it promised to point the way to the re-establishment of real peace among the nations of the earth. This it was proposed to do by such a limitation of armaments as would clearly indicate the desire and the will for peace.

The Permanent Court of International Justice also represents the desire and the will for peace, but it does so in a special and ideal sense. We have heard of conquered peace, of peace through exhaustion, of peace through starvation; and we have also heard of something which belligerents are always reluctant to accept, and that is a peace without victory. But, no matter by what means war may be ended, there is one thing certain, and that is that no peace that depends mainly on force for its continuance can ever endure. It is only when the minds of men can be brought into a common accord that peace is definitely assured. To this end the Permanent Court of International Justice has been ordained, in the effort to create an institution which should embody the highest human ideal, that of peace through justice, and particularly justice based on law.

Having thus stated what the Permanent Court of International Justice represents, I will endeavor as rapidly as possible to describe its origin and constitution; and if in so doing I speak less briefly than I usually do at public dinners, I can only beseech you to "hear me for my cause"!

Under the treaty or convention for the Pacific Settlement of International Disputes, concluded at the first Peace Conference at The Hague in 1899, and amended and renewed at the second Peace Conference in 1907, there was established at The Hague what is called the Permanent Court of Arbitration. Of this tribunal, which is still in existence, I have naught to say but in commendation. It has served, and will continue to serve,

a useful purpose. The Permanent Court of International Justice is not designed to supersede it. But the Permanent Court of Arbitration is not a court in the ordinary sense. Under its conventional constitution, each signatory Power may appoint four persons, who are called members of the court. They are appointed for six years, and may be reappointed. There are now upwards of one hundred and twenty of them, but they do not constitute an actual tribunal for the trial of cases. They form, on the contrary, a panel, or eligible list, from which, when a case is submitted, arbitrators, usually not exceeding five in number, are specially chosen to hear and determine the controversy.

In 1907 the United States presented to the second Peace Conference at The Hague a proposal for the establishment of a Permanent Court, in the sense of an actual trial court, with a determinate personnel. Such a body, it was argued, would secure greater certainty and continuity in the application of legal principles and contribute more to their systematic development. The idea was by no means new; but it had for the most part been left to those who dreamed of "poetic justice, with her lifted scale." At length, however, it seemed to be capable of realization. The Conference debated the proposal and sought to adopt it, but was unable to agree on a plan for the selection of the relatively small number of judges from the actually large number of countries forming the court's constituency.

Without reviewing in detail what has since taken place, I am justified in saying that the Permanent Court of International Justice, although constituted under a statute prepared by the Council and passed by the Assembly of the League of Nations, represents the fruition of efforts with which the international activities of the United States have been closely and distinctively identified. We may, indeed, be even more specific. To what extent the insertion, in the Covenant of the League of Nations, of the clause under which the plan of the Court has been adopted, is to be attributed to the suggestion or the efforts of the United States, I am unable to say. But we are definitely assured that such a clause was proposed from the United States, and that it was after the reception of this proposal in Paris that the clause was inserted.

But, whatever the precise circumstances may have been, it was at any rate provided, by Article 14 of the Covenant, that the Council should formulate and submit to the members of the League for adoption a plan for the establishment of a Permanent Court of International Justice. The Council decided that this mandate could best be executed by committing

the formulation of the plan to an international committee, and to this end sent out invitations to service to certain gentlemen residing in different countries. In making its selections, it is proper, certainly on the present occasion, to remark that the Council, in the exercise of that perspicacity and circumspection for which it is justly distinguished, naturally did not overlook the Pan American Society; for it addressed one of its invitations to Mr. Elihu Root, an Honorary Vice-President of the Society, who, as became his character as an honorary official and as a man, accepted the invitation; and it is superfluous to say that, having accepted the duty, he discharged it with characteristic ability and success, bearing, as is universally conceded, an important part in the drafting of the fundamental statute, or constitution, under which the Court is soon to be established.

The international committee's plan, after some revision by the Council, was submitted to the Assembly, by which, with certain amendments, it was unanimously adopted on December 13, 1920. It provides for a Court to consist of eleven judges, called ordinary judges, and four deputy-judges. The statute provides that these numbers may hereafter be increased by the Assembly, on the proposal of the Council, to a total of fifteen judges and six deputy-judges; but there is no present prospect of the exercise of this power.

Both the judges and the deputy-judges are described as members of the Court; but the deputy-judges, as their title indicates, are intended to take the place of judges who may be absent or unable to act. Eleven judges constitute the actual trial court, but, if this number should not be available, nine may constitute a quorum. The distinctive feature of this new judicial tribunal is the fact that it is an actual court with a determinate personnel.

There is another matter, and a very important one, to which I desire at this point particularly to advert. In the resolution by which the Assembly unanimously gave its approval to the statute, it is expressly declared that the Court, when organized, shall sit in all disputes between members of the League as well as in disputes between other States to which the Court is, by the terms of the statute, open. Among those other States is the United States. The resolution furthermore provides that the protocol, by which the statute is accepted, may be signed by all States mentioned in the Annex to the Covenant. It thus appears that all those States, among which again is the United States, may accept and support, as well as use, the Court, even though they may not have accepted the political responsibilities of the League. When a non-member State, without having be-

come a party to the statute, is a party to a suit, it is left to the Court to fix the amount which such State shall contribute toward the expenses.

The question has occasionally been asked how a citizen of a country which is neither a member of the League nor yet a party to the statute can be elected or can sit as a judge in the Court. The answer is ready, and is conclusive. The judges are not elected nor do they sit as citizens or representatives of any particular country. As far as human nature will permit, they are expected to decide impartially between all countries, without favor or antipathy to any. To this end the statute provides that the Court "shall be composed of a body of independent judges, elected regardless of their nationality." The only personal conditions prescribed are (1) that they shall be of "high moral character," and (2) that they shall have "the qualifications required in their respective countries" for "the highest judicial offices," or be "jurisconsults of recognized competence in international law." But the statute also admonishes the electors that the Court as a whole should "represent the main forms of civilization and the principal legal systems of the world." Nor is the election of more than one person of any particular nationality permitted.

When we consider these conditions, including the particular injunction that the world's principal legal systems should be represented, it is not strange that the bar of the United States was not passed over. As provided in the statute, the judges and deputy-judges are elected by the concurrent action of the Council and the Assembly, sitting and voting separately, from a list of candidates nominated by the national groups in the Permanent Court of Arbitration, each group being permitted to nominate four persons, not more than two of whom should be of the group's nationality. As the United States had neither ratified the Covenant nor become a party to the statute, our own national group in the Permanent Court of Arbitration, of which I happen to be one, forebore to make nominations. But, when the Council and the Assembly came to perform their elective function, they had before them an ample list of eighty-nine candidates, or nominees, among whom there were four citizens of the United States, Messrs. Elihu Root, nominated by Bolivia, Brazil, France, Uruguay and Venezuela; Dr. Roscoe Pound, by Siam; Dr. James Brown Scott, by Haiti; and myself, by Italy.

At the outset, I intimated that I was willing to regard my election to the Court as the result of chance; but on reflection I am disposed to modify that view. The Council and the Assembly were aware of their great obligations to Mr. Root, the

Nestor as well as an Honorary Vice-President of the Pan American Society; but he is understood to have intimated that, as one of the framers of the fundamental statute, he felt that he had performed in respect of the Court his full duty. What, then, could have been more natural than for the Council and the Assembly to turn again to the Pan American Society and take its President? Both personally, and as an official of the Society, I am prepared to accept this explanation, which renders superfluous any further allusion to my own case.

As first in the list of Judges, I am glad to mention Robert Bannatyne, Viscount Finlay, formerly Lord High Chancellor of Great Britain, and a member of the Permanent Court of Arbitration. Together with him, we find André Weiss, Member of the Institute of France, Professor of International Law, Jurisconsult to the Ministry of Foreign Affairs, and member of the Permanent Court of Arbitration; Commendatore Dionisio Anzilotti, Professor of International Law at Rome, and Member of the Permanent Court of Arbitration; Rafael Altamira, Senator of Spain, Professor of Legislation and Jurisprudence, and one of the original draftsmen of the Court's fundamental statute; Ruy Barbosa, Brazilian statesman, lawyer, and diplomatist; Antonio Sanchez de Bustamante, statesman, lawyer, and professor of international law, of Havana; Max Huber, Honorary Professor of Public Law at the University of Zurich, and jurisconsult to the Swiss Government in foreign affairs; B. C. J. Loder, Member of the Supreme Court of The Netherlands, and one of the draftsmen of the Court's fundamental statute; Didrik Galtrup Gjedde Nyholm, of Denmark, President of the Mixed Court of Cairo, Egypt, and member of the Permanent Court of Arbitration; and Yorozu Oda, Professor of International law at the University of Kyoto, Japan. To this list is to be added the present speaker, making eleven in all.

The four deputy-judges are Demètre Negulesco, of Roumania, Professor of Law at Bucharest, and a Delegate to the League of Nations; C. H. Wang, President of the Chinese Supreme Court, and of the Committee on Codification of the Laws of China; Nikhailo Jovanovich, of the Serb-Croat-Slovene State; and Frederik Valdemar Nikolai Beichmann, President of the Court of Appeal of Trondhjem, Norway, and Member of the Permanent Court of Arbitration.

The seat of the Court is not, as is often supposed, at Geneva, but, like that of the Permanent Court of Arbitration, is at The Hague. The Members of the Permanent Court of International Justice are elected for nine years, and may be re-elected; and the statute provides something for their physical needs. Travel-

ing expenses incurred in the performance of their duties are refunded to them, and they are allowed 50 Dutch florins a day for living expenses while actually at The Hague. In addition, the Judges, including the President and the Vice-President, who are respectively elected by the Court itself for terms of three years, have an annual salary of 15,000 florins, which, at the normal rate of exchange, is equivalent to \$6,030. With the exception of the President, they are also to receive a duty-allowance, based on aggregate days of actual service; but, except in the case of the Vice-President, who may receive duty-allowances up to a maximum of 30,000 florins, the duty-allowance is limited to a maximum of 20,000 florins in any one year. The President of the Court, as he is required continuously to reside at The Hague, receives, in place of the duty-allowance and the allowance for daily living expenses, a fixed special allowance of 45,000 florins a year. To sum up, the annual compensation of the President is 60,000 Dutch florins, while that of the Vice-President may reach a maximum of 45,000 florins, and that of the other Judges a maximum of 35,000 florins. A very substantial reason for these financial provisions will be seen in the fact that the Judges are not permitted to exercise "any political or administrative function," or to "act as agent, counsel or advocate in any case of an international nature." These inhibitions are applicable to deputy-judges only when they are actually sitting and as regards cases in which they sit. Consequently, the deputy-judges are not provided with salaries, but, if called on for service, are to receive, in addition to their traveling expenses and the allowance of 50 florins a day for living expenses at The Hague, a duty-allowance which is limited to a maximum of 30,000 florins in any one year.

The Court must hold in each year at least one session, which, unless the Court itself otherwise provides, must begin on the 15th of June, and must continue until the cases on the list are disposed of. The President, however, may summon an extraordinary session whenever necessary.

Each member of the Court is required, before taking up his duties, to make a solemn declaration in open court that he will exercise his powers impartially and conscientiously. The members, when engaged in the business of the Court, enjoy diplomatic privileges and immunities.

The official languages of the Court are French and English, but the Court may, at the request of the parties, authorize another language to be used. The parties are to be represented by agents and, as in the case of ordinary courts, may have the assistance of counsel or advocates. Proceedings are both written and oral. This applies to the testimony of witnesses. Hear-

ings are to be public, unless the Court shall otherwise decide, or unless the parties demand that the public be not admitted. Minutes must be kept of all hearings.

All questions are to be decided by a majority of the judges present at the hearing, and in the event of an even division, the President or his deputy is to have a casting vote.

Every judgment is required to state the reasons on which it is based and to contain the names of the judges who have taken part in it. If the judgment is not unanimous, dissenting judges are entitled to deliver separate opinions. Judgments must be read in open court, after due notice to the agents of the parties. If the meaning or scope of the judgment is disputed, the Court, on the request of any party, is to construe it. Applications for revision may be made only on the ground of the discovery of some decisive fact which, when the judgment was rendered, was unknown to the Court and also to the party claiming revision. But no application is allowed if the want of knowledge was due to negligence. The Court frames its own rules of procedure, both regular and summary.

The full Court is required to sit, except where it is expressly provided otherwise. But the statute does so expressly provide in three classes of cases:

1. In cases under the Labor Clauses of the Treaty of Versailles (Part XIII) and of the other Peace Treaties, the Court is required to appoint every three years a special chamber of five judges, by which, instead of by the full Court, the case is, if the parties so demand, to be heard and determined. In all labor cases, whether determined by the full Court or by the special chamber, the judges are to be assisted by four technical assessors, who sit in an advisory capacity but do not vote.

2. In cases relating to transit and communications, particularly under Part XII (Ports, Waterways and Railways) of the Treaty of Versailles, and the corresponding parts of the other peace treaties, provision is made for the appointment of a similar special chamber, working under similar conditions and with similar procedure.

These special chambers may, with the consent of the parties to the dispute, sit elsewhere than at The Hague.

3. The Court is to form annually a chamber of three judges, who may, at the requesting of the disputants, hear and determine cases by summary procedure.

With the mention of one additional but very material point, I will bring my account of the Court to a close. The terms of the Covenant contemplated only the creation of a voluntary jurisdiction, and specified, as among disputes "generally suitable" for arbitration, those concerning (1) the interpretation

of a treaty; (2) any question of international law; (3) the existence of any fact which, if established, would constitute a breach of an international obligation, or (4) the nature or extent of the reparation to be made for the breach of an international obligation. Such disputes, it was provided, might be tried by a court agreed on by the parties or stipulated in any convention between them. There was no word of compulsion or of obligation. Nevertheless, the plan prepared by the international committee proposed that the Permanent Court of International Justice should, as between members of the League, have, without any special convention, jurisdiction of cases of a "legal nature" falling within the four categories above enumerated, as well as the interpretation of sentences passed by the Court itself, and, in the event of a dispute as to whether a case came within any of the specified categories, the dispute was to be settled by the decision of the Court.

When this plan was received by the Council, objection was made to the jurisdictional clauses on the ground that it in effect amended the Covenant, in that it substituted the decision of the Permanent Court for the free choice which the Covenant allowed to the parties between laying their dispute before that Court, or before another international tribunal, or before the Council. In the end this objection prevailed; and the Statute, as approved by the Assembly, simply provides that the jurisdiction of the Court "comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force." The advocates, however, of a broader, more definite and more exacting obligation were not wholly defeated; since the statute further provides that any Power may, either when ratifying the statute or at a later moment, declare that it recognizes as obligatory, *ipso facto* and without any special agreement, as regards any other Power accepting the same obligation, the jurisdiction of the Court in all or any of the four legal categories above enumerated; that such declaration may be made unconditionally, or on condition of reciprocity, or for a certain time; and that any dispute as to whether the Court has jurisdiction shall be determined by the Court itself. Such a declaration had, prior to November last, been signed by 18 Powers, and they are waiting for some of the Great Powers to follow their example.

On December 1st I received from Sir Eric Drummond, Secretary General of the League of Nations, a telegram inviting me to appear at the Peace Palace, at The Hague, at eleven o'clock in the morning of January 30, 1922, to take part in the organization of the Court, and stating that, after this preliminary task had been performed, the "solemn opening" would take

place. I confess that I could not read these words without emotion. Here, at length, was the actual call to duty. That duty the members of the Court, we may feel assured, will, to the full measure of their strength, endeavor to perform. But this alone will not suffice.

I am not accustomed either to cherish illusions or to encourage others to cherish them. The Court, if it is to fulfill its high mission, must have the support of the governments of the world and of public opinion, being, in this respect, like all other human institutions. I shall not be discouraged if, at the outset, the Court is not overburdened with business. The Supreme Court of the United States, at its first regular session, had, I believe, no cases on its docket. Nor later, when business slowly increased, were its decisions always effectual. We live in a world of change. Mr. Bryan, when he had a sword beaten into a ploughshare, caused to be inscribed on it, among other things, the sentiment, "Nothing is final between friends." I go farther, and say that nothing is final. The worthiest and sublimest efforts may be destined, if not to failure, at least to disappointment. Tennyson has told us that it is "better to have loved and lost, than never to have loved at all." So, I affirm, it is better to have hoped and lost than never to have hoped at all. But hope is itself eternal.

Some years ago, at St. Moritz, there blew into the quiet hotel at which I was staying a relatively young couple from Cape-town. Their accent denoted that they were natives of London, and, by way of illustration, I will conjecture that their name was Hopkins and that they called it 'Opkins, or, if you prefer, that their name was Atkins and that they called it Hatkins. On the active and virile initiative of the husband, they had come for the winter sports, and, though strangers to them, were bent upon learning. To this end they promptly removed to a hotel frequented by sportsmen, and a few days later, as I approached a toboggan-slide, I saw them coming full tilt down the icy run. But, hardly had they passed me, when they both came to grief, first the wife, and then, a little farther on, the husband. The latter, gathering himself together, scrambled back to the place where the wife lay, and turning her in the snow, inquired, "Little girl, are ye 'urt?" "Only a little bruised," she faintly answered. "Good!" exclaimed her sturdy spouse; "get up an' try it again."

This incident has its amusing side; but, in the simple, ingenuous exhortation of the British empire-builder, there breathed the spirit that has sustained and borne to victory all great causes. Even the most beneficent movements must meet with reverses; but they never can wholly fail, if, in the day of

adversity, we recall the injunction, "Get up an' try it again." Nor in the present instance is there any reason even to think of failure. Prior to November last, the protocol accepting the Court had been signed by 45 states, of which 32 had formally ratified it and others were in the process of so doing.

And what shall I say of the Pan American Society? It is not a new institution, and the fact that it has so palpably contributed from its membership to the constitution and establishment of the Permanent Court of International Justice is only the latest proof of its fair repute. Nevertheless, I wish again to give it, as I have so often done before, my benediction.

I once knew a man, more noted for wit than for piety, who said that he liked his church because it did not intermeddle either with politics or with religion. This cannot, to the full extent, be said of the Pan American Society. The Society, it is true, does not intermeddle with politics. Its objects, as defined in its charter, are (1) to promote acquaintance among representative men of all the American republics, (2) to show hospitality and attention to representative men of the other American republics who visit the United States and (3) to take such steps, "involving no political policy," as may be deemed wise to develop and conserve "mutual knowledge and understanding and true friendship among the American republics and peoples." But, while the Society is thus wholly excluded from politics, it may be said to have a religion, this being the preservation of peace and good-will throughout the American continents.

The Pan American Society does not, however, pursue this exalted object with any narrow or contracted view. It finds in its title no implication of antagonism to the rest of the world. On the contrary, it sees in the word "Pan American" not a symbol of selfishness and still less of aggression, but only a recognition of the fact that the world is large and that ideas and ideals of worldwide interest and application often may be effectively promoted by their intensive development within a certain sphere. In a word, the Pan American Society strives to cultivate American brotherhood as a type and an example of human brotherhood.

Animated and inspired by these lofty purposes, long may the Pan American Society of the United States endure and flourish! It is a source to me of unfeigned regret that I am unable to continue my activity in its affairs. But, when I look about me tonight on this gathering, and reflect that my friends and associates in the Society, unaided by myself, have brought this goodly company together, I feel that the future of the Society is safe in their hands. When they meet about the council board,

although I may not be physically present, they will know that my heart is with them; and it will be to myself a great consolation to believe that I may still be in their thoughts and that now and then my name may be spoken.

PROPOSED REMOVAL OF THE MEDICAL DEPARTMENT OF THE UNIVERSITY OF VIRGINIA¹

SOME thirty years ago George Bancroft, statesman and historian, published a pamphlet entitled *The Constitution Wounded in the House of Its Guardians*. This title aptly expresses the thought which the proposal to move the medical school to Richmond must raise in the minds of the great body of those who are bound to the University by ties of gratitude and affection. As one who in his youth trod her classic halls, I am privileged to say, as did Webster when speaking of his Alma Mater, "There are those who love her!" This sentiment of deep attachment is characteristic of the alumni of the University of Virginia. In useful demonstrations of their loyalty they will never be found wanting. They will relax their efforts only when compelled to believe that their exertions are probably futile, because the legal preservation of the object of their sacrifices and benefactions is uncertain and insecure. It rests with the General Assembly of Virginia, wielding, as the University's legal guardian, the power of life and death, to lift this pall by rejecting the present proposal with such emphasis as to convince not only the Alumni but the entire American people that the unity of the University, which is its life, is forever secure.

1. Foreword to *Shall the Medical Department of the University of Virginia Be Abandoned and Removed to Richmond*. The Record in the Case and a Discussion of the Reports of the Commission on Medical Education in Virginia. 1921.

BENEFICIAL OWNERSHIP OF PROPERTY AS AFFECTING ITS NATIONALITY¹

CASE OF THE STANDARD OIL COMPANY (NEW JERSEY), A CORPORATION WHOLLY OWNED IN THE UNITED STATES, BEFORE THE INDEPENDENT TRIBUNAL UNDER THE AGREEMENT BETWEEN THE UNITED STATES AND THE REPARATIONS COMMISSION, SIGNED AT PARIS, JUNE 7, 1920, AGAINST THE CLAIM OF CERTAIN EUROPEAN GOVERNMENTS, WITH WHICH THE UNITED STATES WAS FOR A TIME "ALLIED" OR "ASSOCIATED" IN THE WAR AGAINST GERMANY, TO APPROPRIATE AND CONFISCATE, AS WAR INDEMNITY, CERTAIN TANK STEAMERS, REGISTERED IN THE NAME OF A WHOLLY OWNED GERMAN SUBSIDIARY COMPANY, AND WHICH HAD LAIN, UNMOLESTED, IN A GERMAN PORT THROUGHOUT THE WAR

BY the Treaty of Peace between the Allied and Associated Powers and Germany signed at Versailles, June 28, 1919, Germany was required to "make compensation for all damage done, whether by land, by sea, or from the air," to the civilian population of the Allied and Associated Powers and to their property, during the period of her belligerency, and, among the various kinds of German property specified for use as reparations, were "all the German merchant ships which were of 1,600 tons gross and upwards."

Among those immediately affected by this stipulation was that one of the group of Standard Oil companies which was incorporated in the State of New Jersey, and commonly designated as Standard Oil Company (New Jersey). Of this company all the shares were held by citizens of the United States; but, in carrying on its worldwide activities, it had, for reasons of convenience and efficiency as well as in compliance with local regulations, formed subsidiary companies, organized under the local laws, but owned, wholly or in major part, by the parent company. Among these subsidiaries was the Deutsch-Amerikanische Petroleum Gesellschaft, commonly called the D. A. P. G., a German corporation, organized in 1890 with a capital of 9,000 shares of 1,000 marks each, making a total of 9,000,000 marks, with voting rights, and 21,000 share warrants, of 1,000 marks each, without voting rights. The organizers of this particular subsidiary were individual members of German firms engaged in the importation and sale of

1. The *Evening Post* Job Printing Office, 1921.

American petroleum in Germany, Switzerland and a part of Holland.

Within two months after the foregoing transaction the Standard Oil organization of that time, called the Standard Oil Trust, purchased 4,500, or one-half, of the shares of the D. A. P. G. in exchange for 2,500 Standard Oil Trust certificates; and on May 18, 1891, 3,250 Share Warrants were purchased for cash. Further purchases continued to be made until by September 1, 1911, the Standard Oil Company owned all the 9,000 shares and 20,974 of the 21,000 Share Warrants representing a cash investment of \$15,274,314.22. Before the question of reparations arose, the investment of the Standard Oil Company in the D. A. P. G., wholly apart from earnings turned back into the property and business, amounted to \$22,403,129.32.

After the outbreak of the war in Europe, in 1914, all the D. A. P. G. tankers outside German ports were in due form transferred to the Standard Oil Company and, in conformity with legislation then lately adopted, were registered as American vessels and put under the American flag. The nine tankers in controversy, with the exception of one that was building and incomplete, were, because of the naval activities of the Allies, obliged to remain in German ports, so that their transfer to American registry was impossible. The result was that, if the ships were confiscated with the approval or acquiescence of the United States, the latter would, by reason of its military and financial aid to its "Allies" or "Associates," be put in the position of aiding and abetting the confiscation of American property that was created by American capital for the spread of American commerce and the development of American industry.

Eventually the ships, in spite of their American ownership, were, because they "flew the German flag," turned over to the Reparations Commission under the decision of the Mixed Arbitral Tribunal established under the Versailles Treaty. From this decision the American member, Colonel Bayne, dissented.

The argument, otherwise known as "The Case," was as follows:

I. THE ANTECEDENTS

1. DEFINITION OF THE ISSUE

There is one and only one question involved in the present case; and that is the question whether uncaptured vessels²

2. *Infra*, p. 234.

not only beneficially, i. e., actually, owned by an American-owned American company, but built with its money and used by it in carrying on American commerce, and which remained throughout the war unmolested in a German port, can, because they were registered in the name of a company which, though owned by the American company and employed by it as a local branch or agency for the conduct of its business in Germany, was incorporated in that country, be now confiscated and appropriated by "Allies" or "Associates" of the United States in the war as indemnity for acts of Germany.

The Standard Oil Company affirms that such an appropriation of an American investment, to say nothing of the crippling of an American business, would violate not only established principles of law and of equity, but also the elementary dictates of justice, fair dealing, and common sense. It would further be attended with the absurd consequence that, while the appropriating powers would be enriched, Germany would likewise gain a credit upon her indemnity, in precise proportion to the confiscation and sacrifice of American property rights and of American interests. The loss would fall, not upon Germany and her citizens, but upon the United States and its citizens, who would thus be condemned to pay the indemnity assessed upon Germany and in effect be penalized as enemies.

The Standard Oil Company maintains that no government, or combination of governments, and that no treaty stipulation, can either legitimate or excuse such a confiscation of the private property of a friend and associate in war.

No doubt the word "confiscation" tends to grate upon fastidious sensibilities. Perhaps this may account for the vague and wandering intimations, sometimes borne to the Company through the air, of a possible, eventual pecuniary solace for the loss with which it is threatened. But no pecuniary solace can alter the fact that it is only through the enforcement of a claim of confiscation that the Company's ships can be taken from it. It is only through the gateway of confiscation that the property can be reached.

Nor does it alter the essential nature of the transaction, or satisfy the demands of law, of equity, or of fair dealing, to say that at some place, at some time, in some way, in the future, the Standard Oil Company may at last receive a sum of money, the amount of which presumptively is to be determined by those who have taken its property.

The Standard Oil Company is in business. It wishes to continue in business, and has no desire to transfer its property and equipment to its foreign competitors and retire on the proceeds.

The issue, which the Standard Oil Company has thus stated, will be made plain in what follows.

2. THE STANDARD OIL COMPANY AND ITS FOREIGN BRANCHES

The Standard Oil Company is a corporation formed under the laws of the State of New Jersey, United States of America.

Substantially all the shares of the Company—it has no bonded indebtedness—are held by citizens of the United States. None is held by foreign companies or corporations. In its constitution and capitalization, and in the conduct of its business, the Company is distinctively American. As a manufacturer and distributor, it has carried the products of American industry into all parts of the world, being often a pioneer in the spread of American commerce.

In carrying on its world-wide activities, the Standard Oil Company, following modern business methods, has, for reasons of convenience and efficiency, as well as of compliance with local regulations, conducted its operations in foreign countries, as other companies have done, largely through subsidiary companies, organized under the local laws, but owned, in whole or in major part, by the parent Company. These subsidiaries, representing the investment of American capital, and constituting in effect outposts of American commerce, have been recognized, by other governments as well as by the United States, as being entitled to American diplomatic protection. In conformity with modern law and practice, national and international, the "corporate entity" of these subsidiary organizations has been treated merely as an instrumentality of business, and has not been permitted to obscure the real financial interest, or to serve as a flimsy and unscrupulous pretext for the confiscation of the property and rights of the actual, beneficial owner—the American company.

If it were desired to destroy the foreign business of the Standard Oil Company and eliminate it as a factor in foreign commerce, the direct and effectual way to do so would be to take from it the property it owns and the business it conducts through its foreign subsidiaries.

3. TANK STEAMERS

In the development of its international business, the directors of the Standard Oil Company had the sagacity to foresee the importance of providing the Company with its own transportation. To this end the Company built and operated a large number of tank steamers. Owing to the relatively high costs of construction in the United States, as well as to condi-

tions imposed by the navigation laws, the Company, in order to meet the competition of its foreign rivals, was, like other American companies, compelled to build and operate many of its ships through its foreign subsidiaries; but, like the rest of the property of those branches, they belonged, actually, beneficially to the parent Company.

One of the subsidiaries through which the Standard Oil Company built and operated tankers on a large scale was the *Deutsch-Amerikanische Petroleum Gesellschaft*, its German subsidiary, popularly known as the D. A. P. G. The D. A. P. G. fleet, which comprised the tankers now in question, was used by the Standard Oil Company in commerce with Germany and also with the rest of the world. *For the purpose of building it, the Standard Oil Company made cash advances, the ships thus representing the direct investment of American capital.*

4. THE D. A. P. G.; THE STANDARD'S GERMAN BRANCH

Through the *Deutsch-Amerikanische Petroleum Gesellschaft*, or D. A. P. G., a German corporation, the details of whose organization and development are elsewhere set forth, the Standard Oil Company, for thirty years, has carried on its business in Germany. The importance of that business in its relation to American commerce and industry, is shown by the fact that petroleum and petroleum products constituted in 1913-14, before the outbreak of the Great War, one of the five most valuable items of export from the United States to Germany, and that among those products illuminating oil, the greater part of which was manufactured by the Standard Oil Company, amounted, if valued by New York Produce Exchange quotations, to about \$13,000,000. Moreover, the Standard's local investment in Germany, through the D. A. P. G. and sub-companies, in plant and equipment, exclusive of steamers, was conservatively estimated, in April, 1914, at \$8,000,000, while the steamers, owned through the D. A. P. G., were valued at \$15,000,000. With the addition of goodwill to plant and equipment (including steamers), the business was valued at \$48,000,000.

The total capitalization of the D. A. P. G. is M. 60,000,000, represented by Shares, Share Warrants, and Debentures, as follows: Shares, M. 9,000,000; Share Warrants, M. 21,000,000; Debentures, M. 30,000,000.

Except that the Shares carry voting power, all three classes of securities represent a substantially identical interest in the property and business of the D. A. P. G., and share alike in its earnings. They are all entitled to the same rate of return, and are alike wholly dependent, for profit and value to their owner,

upon the retention by the D. A. P. G. of its plant, equipment and business.

This is so even with the "Debentures," which, although they speak of "interest," make it payable at the same rate per cent as the dividends on the shares. In essence, the Debentures partake of the nature of a preferred stock, whose redemption is optional, but whose payment cannot be called for before December 31, 1925.

They were issued to the Standard Oil Company to reimburse it for cash advances for the building of tankers.

All the securities of the D. A. P. G., except the relatively insignificant amounts of M. 26,000 of Share Warrants and M. 6,500 of Debentures, were absolutely owned by the Standard Oil Company; nor, but for an incident hereinafter narrated, relating to the Shares and thus affecting only nine out of sixty parts of the Standard's capital investment, could the unbroken continuance of this entire ownership be questioned at the present moment. The Standard's beneficial ownership and its effects were universally acknowledged. The United States repeatedly made diplomatic representations against acts or threatened acts of the German Government injurious to the D. A. P. G. Such representations were made just prior to the outbreak of the war in Europe in 1914, when the German Government proposed to establish a petroleum monopoly. The diplomatic interposition of the United States was accepted. The D. A. P. G. was identified as the embodiment of an American interest. This relation was also recognized by the British and French Governments, as well as by the German Government, in the authorized transfer to the Standard Oil Company and to the American flag, towards the end of 1914 and in 1915, of D. A. P. G. ships outside German ports. The fact is well known that during the recent war transfers of merchant vessels from belligerent to neutral flags were as a rule opposed and disregarded by the European belligerents. But, although the ships above mentioned, their legal title being in a German corporation, flew the German flag, their transfer to the neutral American flag was permitted by reason of their actual, beneficial American ownership, antedating the war.

Early in February, 1917, when war between the United States and Germany, although it was not declared till two months later, seemed to be imminent, the Standard Oil Company agreed to the transfer of its Shares in the D. A. P. G. to certain German subjects, who had long been directors of that subsidiary, and in whose personal integrity and loyalty to its interests the Standard had and has entire confidence. Communication, though still lawful, was difficult and uncertain,

and there was no opportunity for discussion. The Shares, though carrying voting power, represented less than a sixth of the capital investment. The suggestion, which came from the other side, was made by a wireless message, and was accepted by the Standard in the same way, solely in the belief that, unless it agreed to the transfer of voting control, the D. A. P. G. and all its property would be seized and placed under sequestration by the German Government.

The Shares were sold at par, subject to a later adjustment of the price, and the purchasers pledged, as security and partial consideration for payment, a relatively small amount of American securities which they owned and held in the United States. The transaction in no way injured, but on the contrary served the interests of the United States. The supposition that the prospect, or even the "imminence," of war between two countries renders contracts between their citizens unlawful, is altogether unfounded.³ Moreover, the value of the German-owned property in the United States, belonging to and pledged by persons who subsequently became enemies, was relatively slight as compared with the value of the American-owned property in Germany, including ships and structures on land, which it was sought to save from sequestration.

A return of the foregoing transaction, with a list of the pledged securities, was made to the Alien Property Custodian of the United States on December 21, 1917. Eight months later, on August 23, 1918, the Alien Property Custodian demanded that all the pledged securities be turned over to him as German property.

The Standard Oil Company asked that this demand be cancelled and annulled. This request, which was made after the signing of the Armistice, the Company justified on the ground, (1) that the Armistice, and the declaration of the President, in communicating it to Congress, that the war had "thus" come "to an end," had suspended the power of the Alien Property Custodian to make further seizures of enemy property, and (2) that, as the securities had been pledged to the Company for payment of a debt, it was legally entitled to the possession of them.

The Alien Property Custodian, however, on February 6, 1919, after mature consideration, denied the request, and required the securities to be turned over to him, for reasons which he stated as follows:

In reference to the alleged sale of February 5, 1917, the standard by which the transaction must be judged is that defined by the Supreme

3. *Janson v. Driefontein Consolidated Mines* (1902), A. C., 484.

Court of the United States in the case of a captured vessel, when the Court said:

"The opportunities for fraud being great, the circumstances attending a sale are severely scrutinized and the transfer is not held to be good if it is subjected to any condition or even tacit understanding by which the vendor keeps an interest in the vessel or its profits and control over it, a power of revocation or a right to its restoration at the close of the war."

Whenever the facts seem to justify the conclusion that the transfer of property has been made in contemplation of the war to defeat the belligerent rights of the United States, to avoid the effects of an anticipated Trading with the Enemy Act, or with a view of resuming the ante bellum status at some time in the future, I have not hesitated heretofore to cut through the contracts, conveyances, obligations and agreements by which the parties have sought to conceal their real purposes and have declared the property to be enemy-owned. I cannot see that we should make any exception in this case. The alleged sale was made by the exchange of two brief cablegrams the day after the German Ambassador to the United States received his passports, when all the world knew that the severance of diplomatic relations meant that war between Germany and the United States was imminent. It was made under circumstances and in a method which plainly indicated that the purpose was to Germanize the American property in Germany and to Americanize the German property in the United States, in order to defeat the belligerent rights of the countries in which the property was respectively located, and to leave the properties in the possession of the private individuals who had theretofore acted as agents and representatives of the enemy owners in the custody of the property.

It may be a regrettable circumstance that the balance in the trade is against the American citizens but no real or permanent injury will be done to the Standard Oil Company if this sale is treated by the Alien Property Custodian as invalid and the property of Riedemann demanded and taken over. The effect of this undoing of the transaction of February 5, 1917, would be to leave the Standard Oil Company with a claim against Germany for its property located in that country, and it is inconceivable that the company will not be fully protected in such claim by its own Government. Thus, the Standard Oil Company will be in a position to recover the value of its German investment without loss, and this will be no injury to the Standard Oil Company, except that it will have lost its German business, which, however, is the same effect as it contends has already been accomplished by the sale of the D. A. P. G. stock to Riedemann. Instead of having a claim against Riedemann for an unpaid balance due on this alleged sale—the amount to be hereafter adjusted—it will have either a claim against its own Government for its property taken over by Germany under a statute similar to ours, or it will have its own property returned to it unaffected by said alleged sale. The demands for the Riedemann securities should be complied with.

By the terms of the Trading with the Enemy Act, the decision of the Alien Property Custodian, made in the name of the President, has legal force; and the securities in question were accordingly turned over to him. So far as concerns his ascription to the Standard Oil Company of a purpose to "Germanize American property in Germany" with a view to defeat Germany's "belligerent rights," the Company is content to quote a great judge, who, when restoring to the British owners a ship which, while lying ice-bound in a Russian port, after the outbreak of the Crimean war, was, in order to prevent its seizure, "Russianized" by a fictitious transfer to Russian merchants, declared: "I deem the protection of British property from hostile confiscation a lawful and praiseworthy object." ⁴ The decisive consideration with the Alien Property Custodian no doubt was, as his statement indicates, the question of the pledged securities; and, in holding that no sale had taken place, and requiring the securities to be turned over to him, he pointed out that the effect was to preserve to the Company its original property rights, in the assertion of which he declared it to be "inconceivable that the Company will not be fully protected . . . by its own Government."

The powers of the Alien Property Custodian, under the Trading with the Enemy Act, are expressly recognized by the Treaty of Versailles; and his ruling in the case in question is conclusive on all the governments concerned. Its finality is expressly recognized by the Treaty.

Part IX, Financial Clauses, after an enumeration of priority charges and their classes, provides:

Article 252. The right of each of the Allied and Associated Powers to dispose of enemy assets and property within its jurisdiction, at the date of the coming into force of the present Treaty, is not affected by the foregoing provisions.

Article 297 (b) (Sec. IV. Property, Rights and Interests) reserves to the Allied and Associated Powers the right "to retain and liquidate all property, rights and interests" belonging to German nationals or companies within their respective territories; while, by Article 297 (d), all "acts done or to be done" by the Allied and Associated Powers, in execution of their exceptional war measures, or measures of transfer, are, as between those Powers or their nationals and Germany or her nationals, to be "considered as final and binding upon all persons," except where reservations are specified in the treaty.

This stipulation is buttressed by paragraph 2, of the Annex to Section IV, by which Germany in terms renounces the right

4. Dr. Lushington, *The Ocean Pride*, Spinks, 66; 2 E. P. C., 309, 312.

to make or to bring, for herself or for "any German national wherever resident," any "claim or action . . . against any Allied or Associated Power or against any person acting on behalf of or under the direction of any legal authority or Department of the Government of such a Power in respect of any act or omission with regard to his property, rights or interests during the war or in preparation for the war"; and further agrees that "no claim or action shall be made or brought against any person in respect of any act or omission under or in accordance with the exceptional war measures, laws or regulations of any Allied or Associated Power."

Even if these stipulations would not prevent a citizen of an Allied or Associated Power from asserting an interest in the proceeds of property sequestered and sold as enemy property in another such country, by its Alien Property Custodian, yet they would seem clearly to preclude an Allied or Associated Power from asserting, in respect of property in Germany, claims of German nationals, whose recognition would require the annulment of the action of the Alien Property Custodian of another Allied or Associated Power. Nor would the unwarrantable character of such an assumption be mitigated by the fact that, as in the present case, the sole object and motive of the Allied or Associated Power, in its unauthorized espousal of the claims of German nationals, is to obtain for itself, through confiscation, property beneficially owned by nationals of another Allied or Associated Power, whose right the action of the Alien Property Custodian supports.

5. RUMORED DESIGN TO CONFISCATE D. A. P. G. TANKERS

We may now ask, On what ground can any of the Powers, lately "allied" or "associated" with the United States, claim to be permitted to appropriate the D. A. P. G. tankers which remained during the war, uncaptured, in German ports?

It has been vaguely conjectured that they possibly may do so on the theory that they have, as victors, a paramount lien on all private property the legal title to which is vested in German individuals or corporations, and may accordingly pick and choose at will, regardless of beneficial ownership by allies or neutrals; but, as this conjecture at once transfers us from the domain of law to the realm of fantasy, and is contrary to what was professed and practiced during the war, it need not be considered.

It is evident that any claim by "Allied" or "Associated" Powers now to appropriate specific property beneficially owned by Americans, must seek a cloak of respectability solely among

the provisions of the Treaty of Versailles, popularly styled "The Peace Treaty."

No such disguise can be found in the terms of the Armistice of November 11, 1918, or of its renewals.

The Armistice, while stipulating (Art. XX) for the cessation of hostilities at sea, provided (Art. XXVI):

"The existing blockade conditions set up by the Allied and Associated Powers are to remain unchanged, and all German merchant ships found at sea are to remain liable to capture."

In harmony with this clause, transfers meanwhile of German merchant ships to neutral flags were (Art. XXXIII) forbidden. Nowhere is it hinted that uncaptured German merchant ships, whether in port or at sea, were to be considered as having already been captured.

On December 13, 1918, a convention was signed at Treves prolonging the Armistice with Germany for one month, till January 17, 1919. No mention was made of ships.

On January 16, 1919, a convention was made at Treves prolonging the Armistice for another month, till February 17th, and it was further stipulated that this prolongation of one month should be extended until the conclusion of the peace preliminaries, subject to the approval of the Allied Governments. This convention (Part 5) contains naval clauses, but they merely supplemented Article XXII of the original Armistice, relating to the surrender of submarines; Article XIII, relating to German surface warships; and Article XXX, requiring the restoration of all merchant ships in German hands belonging to the Allied and Associated Powers. Nothing was said as to merchant ships flying the German flag.

Finally, on February 16, 1919, a convention was signed at Treves prolonging the Armistice "for a short period," but indefinitely, subject to a right of termination by the Allied Powers on three days' notice. Again, nothing was said about merchant vessels flying the German flag.

Nevertheless, early in 1919, a rumor reached the Standard Oil Company that a proposal would be made, in the peace negotiations at Paris, that the D. A. P. G. tankers be turned over to France as part payment of her individual indemnity. This report, although its apparent benevolence towards France did not inspire confidence in its entire accuracy, derived color from the movement then and still afoot in France to convert the temporary government control of the purchase and supply of petroleum, which was created during the war and was to end six months thereafter, into a permanent government monopoly. Of this plan the leading advocate was Senator Berenger, head of the French Petroleum Commission, in whose work he was

ably assisted by Lieut. Georges Benard, who appears in Skinner's (British) Oil and Petroleum Directory for 1918 as a director in Lord Cowdray's Mexican Eagle Oil Company, Ltd., since transferred to the Royal Dutch-Shell combination, which, together with the Anglo-Persian Company, directly owned by the British Government, distinctively represents British oil interests and is the Standard Oil Company's chief foreign competitor.

6. PROTEST OF STANDARD OIL COMPANY

The Standard Oil Company, confronted with an attempt on the part of powerful and rival foreign interests to "capture" a fleet of tankers which it had built and paid for, could not hesitate to appeal to its Government for protection. It accordingly presented to the Department of State, at Washington, on March 5, 1919, a formal protest, reading as follows:

This measure, if adopted, would involve, in the case of the nine D. A. P. G. steamers, nothing less than the appropriation and confiscation of the property rights and interests of a citizen of one of the Allied and Associated Powers for the benefit of the Government and citizens of another one of such Powers. This would necessarily be so, since the ships remaining in German ports have not been captured. If this situation were not open and obvious, it would be clearly established by the terms of the Armistice, which expressly provide that merchant ships under the German flag, if found at sea, remain liable to capture. If so captured, they would naturally be condemned to the captor; and, under the rule of the Prize Courts, individual claims and liens would be sacrificed. But the steamers remaining in German ports cannot in any sense be considered as having been captured. They have not been captured by all the Powers, and still less can they be considered as having been captured by any one of the Powers. Hence, so far as concerns the nine D. A. P. G. tankers, their taking over for the use and benefit of all or of any of the Allied and Associated Powers, without regard to the property rights and interests of any of their citizens, would in effect constitute the appropriation and confiscation of such rights and interests.

Upon the anomalous character of such a proceeding, involving the appropriation and confiscation of the property rights and interests of a citizen of a friend and ally for the common or individual use and benefit of friends and allies, we do not assume to enlarge. We do, however, feel obliged, as the party directly in interest, to enter a formal and earnest protest, with full reservation of all our rights in the premises.

In bringing this matter to the attention of the Department, we beg leave to ask that the American Peace Delegation be acquainted by cable with the facts, and that suitable steps be taken for the protection and preservation of our rights and interests.

We at present confine ourselves to this aspect of the matter, with-

out undertaking now to emphasize its direct relation to the possibility and the means of reviving and re-establishing the commerce of the United States after the restoration of peace.

The representatives of the United States at Paris were advised by telegraph of the presentation of this protest, and a copy of it was sent to them.

7. THE BRUSSELS AGREEMENT

On March 14, 1919, the Shipping Section of the Supreme Economic Council, in which the United States was represented by Commissioner Robinson, of the United States Shipping Board, concluded with delegates of the German Government, at Brussels, an agreement in regard to the allocation of German ships, which is known as the Brussels Agreement. This agreement contains the following clause:

2. The German delegates further raised the question of the exemption of *tank vessels*.

They were informed that for the time being the Associated Governments would not insist upon the delivery of any tank steamers.

Of this determination, the Company was duly advised by the Department of State.

It was further agreed, in regard to the retention of German crews on ships that were to be delivered up, that, while it would be out of the question to retain such crews on ships allocated to trooping work or on the first ships sent to Great Britain and France, it would be a material consideration, which could be duly taken into account, if the German authorities should undertake, in the case of a transatlantic voyage, to bunker the ships in German ports.

The Brussels Agreement was ratified by the Supreme Economic Council, at Paris, on March 21, 1919.

So far as concerns the tankers, the condition of things established by the Brussels Agreement continued till the signing of the treaty of peace, undisturbed and unquestioned. The ships remained at Hamburg; and, as the "blockade conditions" continued and trade with Germany was prohibited, the Standard Oil Company made no effort to use them, until, peace having been signed and the blockade lifted, commercial intercourse was declared to be restored.

8. RESUMPTION OF TRADE WITH GERMANY

On July 12, 1919, the British Board of Trade issued a notice, announcing the resumption of commercial relations with Germany.

On July 13, 1919, the French Ministry of Foreign Affairs

published in the *Journal Officiel*, a notice to exporters, advising them that, in view of the regular and complete ratification of the treaty of peace with the German Government, the Allied and Associated Governments had lifted the blockade of Germany on July 12, and that in consequence, and in execution of the decree of February 19, 1919, the French Government had decided to authorize, from the date of the publication of the notice, persons subject to French jurisdiction to resume commercial relations with Germany, under stated conditions.

The United States, through the War Trade Board Section, Department of State, also announced on July 14, 1919, the resumption of trade with Germany; and, while declining to issue passports for that country, the Department instructed its diplomatic and consular representatives abroad, on July 26, 1919, that it did not object to American citizens going to Germany, who were called there by urgent and important business.

9. EFFORT TO USE TANKERS

On July 30, 1919, the Standard Oil Company received from its Swiss subsidiary, at Zurich, a telegram concerning the petroleum situation in Germany, saying: "Competition very active. Situation which was in your hands slipping away. Official parties expect from us within next days statement what position you take regarding future supplies. Imports cannot be made without special permit."

This message was immediately communicated to the Department of State, at Washington, with the statement that the Company would greatly appreciate any action which the Department might take to help it to secure the special permit and to enable it to resume shipments to Germany immediately, as far as shipping facilities were available. Meanwhile, the Company took active measures to secure the use of its tankers at Hamburg.

The names and tonnage of these ships are as follows:

Mannheim	4,400 tons deadweight
Helios	4,300 " "
Sirius	4,600 " "
Niobe	9,500 " "
Pawnee	6,800 " "
Hera	5,800 " "
Loki (motor vessel) ..	7,300 " "
Wotan (" ") ..	7,000 " "
W. A. Riedemann... (" ") ..	13,500 " "
	<hr/>
	63,200 " "

Early in August, 1919, the Standard Oil Company heard, through an extract which it received from a debate in the French Chamber of Deputies on the 2nd of July, a reverberation of earlier rumors of designs on its ships. A member, referring to the measure presented by the Government in the Chamber on June 17, 1919, for the establishment of a state petroleum monopoly, descanted upon the great advantage the Government would gain, in carrying out the monopoly, by acquiring the petroleum "fleet" at Hamburg. The Minister of Public Works, while disclaiming any authority to intervene in the question of the petroleum monopoly, which belonged to another ministry, replied that the Government had the tankers at Hamburg in mind and would make every effort to get them.

Although in this incident, as in the rumors by which it was preceded, France exclusively appears in the foreground, the Standard Oil Company would not have it imagined that it has ever supposed that the interest of France in the matter was either exclusive or even relatively the most important. Neither her position as a maritime Power, nor the extent of her interest in the petroleum business, would justify such a supposition. The Company perfectly understood that its rights could be put in jeopardy only by a combination. Meanwhile, neither in the treaty, nor in anything outside of it, did there appear ground for opposition to the Company's present use of the ships.

By the Treaty of Peace signed at Versailles, June 28, 1919, Germany accepts (Art. 231) the responsibility of herself and her Allies "for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war"; but, as it is recognized (Art. 232) that "the resources of Germany are not adequate . . . to make complete reparation for all such loss and damage," certain general categories are established (Reparation Clauses, Annex 1), which are to be applied by a Reparation Commission (Art. 233).

The subject of shipping is specifically dealt with in the Reparation Clauses, Article 244, Annex III, which provides (par. 1) that, with a view to the "replacement, ton for ton (gross tonnage) and class for class, of all merchant ships and fishing boats lost or damaged owing to the war," the German Government, "on behalf of themselves and so as to bind all other persons interested, *cede*," among other things, to the Allied and Associated Powers, all German merchant ships of 1,600 tons gross and upwards.

The next paragraph (No. 2) stipulates that Germany will, within two months after the Treaty comes into force, deliver all such ships to the Reparation Commission.

By the next paragraph (No. 3), the ships and boats mentioned in paragraph 1 are declared to include

all ships and boats which (a) fly, or may be entitled to fly, the German merchant flag; or (b) are owned by any German national, company or corporation, or by any company or corporation belonging to a country other than an Allied or Associated country and under the control or direction of German nationals; or (c) are now under construction (1) in Germany, (2) in other than Allied or Associated countries for the account of any German national, company or corporation.

Clause (b) of the foregoing paragraph evidently recognizes and enforces, as against Germany, the rights, irrespective of flag, which ownership gives. Whether the word "owned" embraces equitable as well as legal interests, the clause does not expressly declare; nor, except as against Germany and Germans, is the question material. As regards Allied and Associated Powers and their nationals, the treaty expressly stipulates that their individual interests, equitable as well as legal, shall be preserved.

This stipulation is found in Article 244, Annex II, paragraph 20, which, in laying down the rules by which the Reparation Commission shall be governed, provides:

The Commission, in fixing or accepting payment in specified property or rights, shall have due regard for any legal or equitable interests (French text, *tous droits et intérêts légitimes*) of the Allied and Associated Powers or of Neutral Powers or of their nationals therein.

This provision, which, fairly interpreted, evidently means that the Commission shall neither *fix* nor *accept* payment by Germany in properties or rights found to belong legally or equitably (beneficially) to Allied or Associated or Neutral Powers or their nationals, is in conformity with the principles on which the Allied Powers themselves acted prior to the entrance of the United States into the war, when, as has heretofore been stated, the British and French Governments formally assented to the transfer to the Standard Oil Company and to the American flag of D. A. P. G. ships flying the German flag; and when the British Government restored to the Standard the D. A. P. G. ship, called the "*Leda*," which was captured at sea under the German flag, in 1914, just after the outbreak of the war, and condemned at Bermuda. Although it has lately been intimated that these were acts of policy, yet it is needless to remark that if the Standard Oil Company had not beneficially owned the ships, it never would have received them. Indeed, the establishment of the principle of beneficial ownership was then of inestimable and far-reaching importance to the Allied

Powers, since it enabled them to preserve the effective use of their supremacy at sea, by preventing the formation in neutral countries of companies, with German capital, to send ships to sea in the German interest under neutral flags. Although the United States at first questioned the claim, the Allies continued to enforce it, the British prize courts formally condemning ships legally owned by neutral companies and flying neutral flags, on the ground that the beneficial ownership was German. The United States, having acquiesced during war in the enforcement of this claim, can hardly be asked now to acquiesce in its being cast aside, in order that property beneficially owned by Americans may also be confiscated.

It is evident that the terms of the Treaty of Versailles, as so far examined, lend no sanction to the supposition either that the property rights of citizens of the United States are to be appropriated by other Governments, whether Allied or Associated, or that the specific property to which American citizens have an equitable claim is to be so appropriated, leaving them the assertion, at some time and in some quarter, of a claim for compensation in money. The rest of the treaty is equally to the contrary.

Thus, where the "property, rights and interests" of nationals of Allied or Associated Powers have been subjected to exceptional war measures and measures of transfer in Germany, Article 297 (a) of the treaty provides that, when liquidation has not been completed, such measures "shall be immediately discontinued or stayed and the property, rights and interests concerned restored to their owners, who shall enjoy full rights therein in accordance with the provisions of Article 298," which stipulates that "the property, rights and interests of the nationals of Allied or Associated Powers" shall be restored and maintained "in the legal position obtaining in respect of the property, rights and interests of German nationals under the laws in force before the war."

If "property, rights and interests," subjected to German war measures, are, when liquidation has not been completed, to be restored to their owners, it is superfluous to argue that, where "property, rights and interests" have not been subjected to such measures, the treaty has not essayed to take from the owners what Germany has not attempted to seize. Such owners evidently retain, wholly apart from the treaty, "full rights" of enjoyment both in Germany and elsewhere. The treaty cannot be held to abridge such rights.

Again, Article 297 (f) provides that, when a national of an Allied or Associated Power, entitled to property which has been subjected to a "measure of transfer," expresses a desire for its

restitution, this shall be granted if the property "still exists in specie." It will hardly be contended that, if such property has not been transferred by Germany, the treaty deprives the owner of its enjoyment.

In view of the stipulations of the treaty, and particularly of their explicit recognition of the principle of beneficial ownership or interest, it appeared to follow that, even if the Reparation Commission should at some future time assume jurisdiction of the case of the D. A. P. G. tankers, it could only hold that, by reason of their beneficial American ownership, they were not distributable as indemnity among the Allied Powers. The Reparation Commission, however, was not in existence, nor could any one tell when it would come into existence. By the terms of the treaty, vessels flying or entitled to fly the German flag were to be delivered to the Reparation Commission only "within two months after the coming into force" of the treaty. The treaty had not been declared to be in force, nor could any one tell when it would be declared to be so. Moreover, the "delivery" for which the treaty stipulated was not a spectacular physical delivery of ships gathered in one spot from all over the world. In view of the crying need of transportation, such a parade would have been indefensible. In the case of ships "under construction" in Germany,⁵ such a requirement would have involved a physical ineptitude, while, in the case of ships under construction "in other than Allied or Associated countries," it would have involved what Germany could not assure, either physically or legally. Manifestly, the delivery was to be a delivery of documents of title, so as to enable the Reparation Commission to transfer the ownership of the vessels.

Meanwhile, the situation, concretely stated, appeared to be that, the treaty of peace having been ratified by Germany, and the blockade having been raised and trade relations restored, there was no reason why the D. A. P. G. tankers, whose provisional exemption from allocation had not been disturbed, should not be used by the Standard Oil Company, their beneficial owner, especially in the transportation of supplies of oil from the United States to Germany, where the need of oil was acute for the revival of industry and for domestic uses. Such use was compatible with the letter as well as with the spirit of the Brussels Agreement, of March 14, 1919. It was also compatible with the terms of the Treaty relating to the Reparation Commission. The Standard Oil Company evidently had and has no power to prevent the Reparation Commission,

5. *Supra*, p. 239.

whether the United States is represented on it or not, from assuming jurisdiction over any matter of which it may see fit to take cognizance. The Company cannot prevent the exaction of documents of any kind from the German Government. Equally powerless is it to defeat any action which the Commission may take within the bounds of law and equity. On the other hand, if action beyond those bounds be contemplated, involving the sacrifice of rights and the destruction of interests which law and equity protect, objection to any possession and use of the ships by the Company at once becomes perfectly intelligible. The defense of such an objection may, however, be left to those who make it.

Observing the letter and spirit of the treaty, as well as the letter and spirit of the Brussels Agreement, the Standard Oil Company instructed its agents at Hamburg to dispatch some of the tankers to the United States with their German crews, taking care, however, that they should be bunkered in Germany for the transatlantic voyage. In so doing, the Company on August 8, 1919, presented to the Department of State, at Washington, a statement comprehensively summarizing the antecedents to date, explicitly setting forth its beneficial ownership, and concluding as follows:

In invoking the support of its Government in the maintenance of its rights, the Standard Oil Company feels that it is justified in advertising to the great service which it rendered to the Allies as well as to its own Government during the war. Although the Chairman of this Company served as Chairman of the National Petroleum War Service Committee, we have no desire to claim any credit for ourselves as contrasted with other American companies. The American petroleum interests as a whole exerted themselves to the utmost to supply war needs, and did in fact meet all demands made upon them. As the result of their exertions, when the Armistice was signed on November 11, 1918, there were in France, Great Britain and Italy greater stocks of oil and oil products than at any previous time during the war. No one questions the fact that the maintenance of a full supply of petroleum and petroleum products was vital to the prosecution of the war.

This Company, by reason of the extent of its resources and operations, naturally made a large contribution to the general result. In so doing it readily assumed all the attendant risks.

The Standard Oil Company (New Jersey) lost during the war, by enemy action, ten ships under the American flag, aggregating 74,674 tons deadweight. One of these was a general cargo boat; the rest were tankers aggregating 69,144 tons. This exceeds, by 16,000 tons, the aggregate tonnage of the nine D. A. P. G. tankers now in German ports. Other ships were attacked, even before the entrance of the United States into the war. Sixty-three of our seamen lost their lives, and others were taken prisoners and carried off to Germany.

On the strength of what has been set forth we beg leave respectfully to request our Government to lend us its aid to enable us without delay to employ our tankers, now in German ports, in our business in which they are greatly needed.

In preferring our request, we beg leave to submit, for the Department's serious consideration, one aspect of the present situation, which, though in no legitimate sense hostile to any other interest, will no doubt appeal more strongly to our own Government than it would do to any other. The present situation, so far as concerns the future extension of trade relations, is precarious for all the Allied and Associated Powers; and it may be assumed that none of them is disposed to seek in present conditions a selfish advantage over the rest.

But the particular question which we are now considering is not one of advantage. It is simply a question of the present sacrifice and loss of commerce, a business, and an investment, which were, from beginning to end, essentially American. The business carried on in Germany through the D. A. P. G., the German branch of the Standard Oil Company, represented the result of twenty-five years of assiduous effort and development. It was created by this Company. The plant and equipment represented the investment of American capital. Of that equipment the ships formed an integral and vital element, for the retention as well as for the development of the business. This relation remains unaltered.

At best, with the drastic industrial changes that have resulted in Germany from the war, including the necessary substitution of other means of lighting for oil, the restoration of our business there not only is problematical but is beset with special difficulties.

The present moment is critical, and prompt action on our part is required to meet it. If our business is not restored, this will mean an immense loss in commerce, in plant, and in investment. If the D. A. P. G. tankers were in the hands of foreign competitors, our difficulties would be incalculably increased, while, if the ships are retained by us, they will be the most efficient instrument of restoration. And if in the end substantial restoration should be found to be unattainable, they would at least constitute an available salvage from the wreck.

The Company has requested one of its representatives in Europe to ascertain if the tankers are prepared to come to the United States, under the German flag, and with their German crews, for cargoes of oil, and if they are ready to come, it is probable that they will soon sail. We therefore beg leave to suggest, for the Department's consideration, that it may be advisable to cable instructions on the subject to the American Embassy at London, and to the American Embassy at Paris, for itself and for Mr. Polk, as present head of the American Peace Mission, for their information and guidance, in case any question should be raised.

The Department, acting upon the foregoing suggestion, transmitted to its representatives in London and in Paris a

copy of the Company's statement, and meanwhile cabled to them a full summary of it.

10. UNFORESEEN OPPOSITION: ATTEMPTED ARBITRARY "ALLOCATION"

The Company had for some days been expecting the arrival of one or more of the tankers off New York, when it learned by a telegram from Paris that the "Allied Naval Court" at Hamburg had refused to permit their departure and had referred the matter to the Allied Naval Armistice Commission in London. In dispatches subsequently received from Hamburg, the "Allied Naval Court" was called the "English Commission." The report of its action was laid before the authorities at Washington; and the diplomatic and naval representatives of the United States in London were immediately instructed to inquire into the matter and to make every effort to secure permission for the ships to sail.

Nothing was heard until a week later, when, on September 11th, the Navy Department received from one of its representatives in London a telegram stating that the president of the Allied Naval Armistice Commission, who is understood to have been Admiral Browning of the Royal Navy, had, on August 15th, assumed to cancel the Brussels exemption and had ordered the tankers to proceed at once to the Firth of Forth for delivery to the Allied and Associated Governments. This arbitrary action is said to have been taken without the concurrence of the American and French members of the Commission. It was at any rate taken without the concurrence of the American member, who, when he discovered it, protested against it. This protest, however, did not prevent those who had conceived the design from taking possession of the ships and distributing them, from proceeding to carry it into execution. Accordingly, the "Allied Maritime Transport Executive" (the subordinate branch of the Supreme Economic Council, formerly called the "Allied Maritime Transport Council"), regarding itself as clothed with jurisdiction by the action of the president of the Allied Naval Armistice Commission, decided to "allocate" the ships among the interested Governments, as follows:

France	23,000 tons
Great Britain	12,800 "
Belgium	12,000 "
Italy	10,000 "
United States	3,200 "

The munificent liberality of the "allocation" to the United States of 3,200 tons out of a total of 61,000 tons of American-owned shipping deserves special attention.

This extraordinary action was not taken without protest on the part of the United States. Captain Tobey, U. S. N., Special Commissioner and representative of the United States Shipping Board, and also American delegate to the Allied Maritime Transport Executive, was then in London. He protested against the attempted allocation both on the ground that the tankers were American-owned and therefore could not be appropriated by the Allies, and also on the ground that the professed cancellation of the Brussels exemption was invalid. In order to cure this irregularity, a meeting of the Shipping Section of the Supreme Economic Council was hastily assembled at Brussels, where, on September 21st, no representative of the United States being present, the Brussels exemption of the preceding March was declared to be cancelled and the "allocation" above mentioned confirmed: and directions were at the same time telegraphed to the "Allied Naval Court" at Hamburg to send the tankers to the Firth of Forth immediately. Not only was the United States not represented, but the prevailing opinion appeared to be that the Supreme Economic Council itself no longer existed, unless perhaps for the purpose of carrying out certain arrangements regarding food supplies. But, however this may be, the Council had always acted on the principle of unanimity, and had no power to dispose of American-owned property without the consent of the United States. Moreover, when the Brussels Agreement of March, 1919, exempting the tankers from allocation, was made, the United States was represented on the Council and was a party to the exemption. It may further be remarked that in September, 1919, there was nothing in the condition of petroleum supplies in the Allied countries to justify even a temporary disposition of the tankers such as was attempted. Largely as the result of the activities of the United States during and after the war, France and Italy were well stocked with petroleum supplies, while in Germany there was great need of them, particularly from the point of view of her ability to resume industry and prepare to make the reparation imposed upon her by the peace treaty.

11. PROTEST OF DEPARTMENT OF STATE

Meanwhile, on September 16, 1919, the Department of State, on receiving the information obtained by the Navy Department, had telegraphed to its representatives that it was not informed on what authority the president of the Allied Naval Armistice Commission had on August 15th assumed to cancel the Brussels exemption, or on what authority the Allied Maritime Transport Executive had refused to authorize commer-

cial voyages of ships not allocated, or had assumed to make further allocations; and the Department accordingly directed its representatives to press for the immediate dispatch of the tankers to the United States for the transportation of petroleum supplies to Germany, where such supplies were urgently needed.

On September 22nd, the Standard Oil Company received from the Department of State a summary of a telegram which it had received from the American Mission at Paris to the effect that the French and British representatives, although conceding that the carrying of oil to Germany would be in the interest of reparation, they desired to obtain the ships ultimately and were reluctant to allow their use in transatlantic commerce even temporarily, lest this might prejudice their "ultimate" or "final allocation"; and that an intimation had been made that the proposed use of the tankers would be facilitated if an assurance were given that it would not be permitted by the United States to prejudice such "allocation."

The Standard Oil Company does not desire to comment on this proposal. It obviously meant that the Company, for the sake of using its own steamers for the shipment of a few cargoes of oil to Germany, was to consent that the Allied Governments, interested in their "allocation," should afterwards appropriate them. The Company immediately declined to accept this proposal, and its answer was at once cabled by the Department of State to the American Mission. Moreover, the Department, when acquainted with what had lately been done at Brussels, at once telegraphed to the American Mission at Paris, urging it to make every effort to have the Supreme Council disallow the pretended decision of the "Supreme Economic Council," and, while preventing the allocation of the ships, to permit their utilization in the supply of oil to Germany.

At this point, on September 30, 1919, the Standard Oil Company addressed to the Department of State further representations, supplementing its letter of the 8th of the preceding month. Soon afterwards the Company received information throwing further light on the origin and motives of the opposition to its use of the ships.

It appeared that on July 30, 1919, the German representatives on the "Rotterdam Commission" asked that eight of the tankers be permitted to proceed in ballast to the United States to bring oil to Germany; and that they were informed that if the Germans wanted oil their proper course was to "deliver" the tankers to the Allied and Associated Governments and then to make application "through the usual channels" for the de-

sired quantity of oil. Late in August a representative of the Standard Oil Company, who was then in Paris, and who had become acquainted with what had taken place in the previous month at Rotterdam, brought the objection to the notice of Major John Foster Dulles, who was then representing the United States at Paris in connection with the Committee on Organization of the Reparation Commission, which was generally known as the Interim Reparation Commission. On August 28th, Major Dulles had a conference on the subject with M. Loucheur, president of the Interim Commission, and later in the day wrote him a letter. This letter referred both to the Brussels exemption and to the American beneficial ownership of the D. A. P. G. tankers, and stated that the Standard Oil Company wished to arrange through its subsidiary to put the vessels into service, presumably between Germany and the United States. The letter recommended that this be done, and in so doing adverted to the circumstance that, when the Germans were requested by the Interim Reparation Commission to specify articles necessary to stimulate the production of coal, they particularly mentioned petroleum products.

The next morning Major Dulles brought up the matter at a meeting of the Interim Commission, where his letter to M. Loucheur was discussed. The result was that Mr. S. Peel of the British delegation sent on to London a report to the British representative on the Allied Maritime Transport Executive, with the comment that, while he thought the ships "ought to be taken over at once and put to work," their being allowed to sail under the German flag was "another matter, to which I hope we shall not consent." This report was immediately communicated to Mr. Kemble-Cook of the British Ministry of Shipping, and the correspondence was placed on the agenda of the Allied Maritime Transport Executive for its meeting on September 4, 1919. At that meeting Captain Tobey, representing the United States, pointed out to the chairman that, while the legal title to the tankers was in the D. A. P. G., the entire beneficial interest belonged to the Standard Oil Company, and that, as they were thus in fact American property, exception would have to be taken to any action on the part of the Executive, allocating the ships to any country other than the United States, and that the American claim would have to be insisted upon. In consequence, no action was taken beyond deferring the further discussion of the matter to the next meeting.

Before the next meeting Senator Berenger visited London; but, before proceeding thither, he made, in the course of a conversation with a representative of the Standard Oil Company

in Paris, the highly interesting suggestion that the Company, notwithstanding its beneficial ownership of the tankers, should help France to get them, for the reason among others that this would emphasize her victory over Germany.

The Standard Oil Company has narrated the foregoing facts, not only for the purpose of tracing the development of the design upon its property, but also for the purpose of refuting the report, which seems to have been more or less disseminated, that its claim to the use of the tankers was put forward, not on the ground that it beneficially owned them, but on the ground that it wished temporarily to employ them for the purpose of supplying the immediate urgent needs of the German market. The Company contents itself with placing on record the facts. From first to last, it has on all occasions placed in the forefront its claim of beneficial ownership, and protested against every attempt to disregard it.

12. ACTION OF UNITED STATES SHIPPING BOARD

Late in September there appeared in the press a report that the *Imperator* and certain other ships, some or all of which had been "allocated" to Great Britain from the German shipping in German ports, and which the British Government had afterwards hired to the United States for repatriation work, had been detained by the United States Shipping Board. In some of the publications, but not in all, the detention of the ships was interpreted as an act of retorsion, designed to block the attempted appropriation of the D. A. P. G. tankers. Of the relative extent to which particular matters influenced the Board's action, the Standard Oil Company is not advised. The Board acted on its own responsibility. So far as concerned the tankers, it needed no information or suggestion from the outside. Through its own representatives in London, one of whom was, as a delegate to the Transport Council, protesting against the scheme of appropriation, the Board was in immediate and constant official contact with the case. If in these circumstances the Board sought to stay the consummation of the scheme, its action is not wholly unintelligible.

13. DELIVERY OF TANKERS TO FIRTH OF FORTH

While the protest of the United States to the Supreme Council seems to have stayed the immediate execution of the London "allocation," efforts to gain possession of the tankers, apparently with a view to its eventual consummation, not only were not abandoned but were redoubled. This was not understood in New York, where it was believed that the decision of the Supreme Council, although its terms were unknown, had, either

directly or by necessary implication, revoked the previous action of the president of the Allied Naval Armistice Commission for the removal of the tankers to the Firth of Forth. But, on October 1, 1919, the Company received from an agent in Hamburg a telegram stating that the "English Commission" was urgently demanding their delivery, and that the local authorities would soon be forced to deliver them up, unless something was done to stay the Commission's demands. Similar reports were received on October 9th, and on November 3rd and 7th. The Company, being at a loss to explain these reports, could only communicate them to the authorities at Washington. The series ended on November 14th, with the report from Hamburg that the ships were being delivered up. The report stated that this was done only after it was learned that the president of the Allied Naval Armistice Commission, when giving his latest orders, was aware of the American protest.

The Company understood and still understands that this coercive delivery was at variance with the agreement reached by the Supreme Council at Paris in September, 1919. But, whatever the fact may be, the Company has been repeatedly assured that it was subsequently agreed that the ships should remain at the Firth of Forth until a solution of the pending controversy was reached.

14. SHIFTING COURSE OF THE NEGOTIATIONS

As has been seen,⁶ although the attempted "allocation" was halted in September, strenuous efforts to carry it through continued. The Standard Oil Company was to be permitted to use the "idle tonnage" for one or two trips between the United States and Germany, on the understanding that the London "allocation" was for the present to stand, and that the Company was to deliver up the ships whenever requested so to do. The United States naturally was not satisfied with this suggestion. Other proposals followed; but, in the face of persistent opposition, the point of attack was shifted. Increased emphasis was placed on the position that the final question of the final disposition of the tankers belonged exclusively to the Reparation Commission, and that the Powers meanwhile were not at liberty to deal with any question whose decision might seem to prejudice the Commission's action.

This view was reflected in a telegram from the Department of State under date of November 12, 1919, carrying to the Company a proposal from Paris to the effect (1) that the tankers should be left in German ports pending the decision of the Reparation Commission; but (2) that, if the Company

6. *Supra*, pp. 245, 248.

should be permitted meanwhile to operate them, it would do so with American crews and under the Allied Maritime Transport Executive's flag, the British representatives fearing the effect of the storm of protest that would result from the use of German crews, when so many sailors were unemployed in Great Britain.

On November 14th—the very day the report was dispatched from Hamburg that the ships were being delivered up—the Company, through its president, made the following answer :

FIRST: We would operate tankers with American crews or even with British crews.

SECOND: We consider it undesirable to place ships under A. M. T. E. flag unless with distinct understanding that this does not give A. M. T. E. any control of operations or in any way prejudice our beneficial title; we should think it preferable to put ships under American flag after reaching United States.

THIRD: We do not feel justified in agreeing to proposal that final determination of title shall rest with Reparation Commission for following reasons: If Treaty should not be ratified by United States this Government would have no representative on Reparation Commission and American interests if committed to it would be wholly without protection. If Treaty should be ratified, its interpretation, so far as concerns American interests, would rest with our Government and we should deem it to be our duty to maintain and to ask our Government to support what we understand to be our rights in the premises. We are advised that as officers and directors of the Company we are not at liberty to agree to surrender any of its property for purposes of indemnity.

FOURTH: We believe that in all the circumstances we are entitled to an immediate determination that the vessels belong to us and to have them turned over to us unconditionally. If final determination of question of title must be deferred, we insist that we are in the meantime entitled to possession and use of vessels without prejudice to the ultimate determination of that question. We do not see how we can consistently consent to vessels lying idle in Hamburg.

A week later the Company received, through the Department of State, an intimation from Paris that possibly some new proposal, reflecting "a more liberal attitude" as to the extension of credits and shipments of oil might expedite a satisfactory solution of the controversy. This intimation resulted from a conversation with Senator Berenger, who was understood to have approved a tentative suggestion that, pending final action by the Reparation Commission, the tankers should remain under the management of the United States, first making two trips to Germany, and then meeting the reasonable necessities of Italy, Belgium and France. It was represented that Senator Berenger, while holding an entirely conciliatory tone and deny-

ing that the opposition to a reasonable settlement came from France, complained that the Standard Oil Company refused to extend six months' credits, as the Dutch and other companies were said to do, and observed that the French Government would thus be authorized to deal with the Company's competitors. Three days later, however, advices were received to the effect that, although Senator Berenger had at first approved the suggested solution, M. Clemenceau would have to pass on it. This reservation was interpreted as reinforcing the effort to secure credits.

The Company was obliged to regard the suggested solution, combining virtually the indefinite allocation of the tankers, after two trips to Germany, to the service of France, Belgium and Italy, with the extension of special credits to France, as a highly disadvantageous basis of discussion. No reason was given for requiring the ships, after a certain time, to be used exclusively for the service of those countries. The Allied markets had all along been fully supplied. On the other hand, in France, the interest of the Government in obtaining the tankers had been openly connected with the pending proposal for a state petroleum monopoly, while in Italy the Government had since November, 1918, been empowered at any time to establish a monopoly in petroleum, coffee, tea, sugar, coal and electric lamps. Nevertheless, the Company, in its desire to pave the way to a solution, consented that the needs of Belgium, France and Italy should be considered in connection with those of Germany, and, in a memorandum of November 29, 1919, offered on this basis to agree that, after completing the proposed two round trips from the United States to Germany, the eight tankers actually in commission should deliver a total of eight cargoes as follows: Two to Belgium, four to France, and two to Italy—all from the United States. The Company further offered to agree that the ships should be delivered directly to the United States Government, rather than to itself, with the understanding that it should use them "without prejudice to the question of title."

15. THE REPARATION COMMISSION

The foregoing offer, although it was immediately followed up with a further assurance by the Company of its disposition to meet any conditions not involving the sacrifice of its position as beneficial owner, failed to bring a solution. The deadlock continued unbroken, the Company still confronted with the demand for unconditional surrender to the Reparation Commission, and the tankers lying idle at the Firth of Forth in the custody of the British Government.

This strategy, though neglectful alike of reparation needs and of American rights and interests, had the merit of boldness. But, no less bold was the horrified suggestion that the Standard Oil Company, in urging its right to the immediate use of the tankers, was asking the powers to set aside the treaty and invade the judicial functions of the Reparation Commission. Neither by the terms of the treaty nor by the conduct of the Powers can this suggestion be justified.

No matter what the personnel of the Reparation Commission from time to time may be, it is in no sense a judicial body, but is a mere executive agency of the Powers of whose representatives it may be composed. These representatives the treaty (Art. 244, Annex II) properly describes as "delegates," of the Powers. The function of assessing, collecting and dividing the indemnity to be imposed on Germany, under the indefinite and complicated provisions of the treaty, was manifestly one which the Powers could not perform by correspondence between their capitals. Of necessity they contrived for the purpose a convenient agency; and this agency they called "The Reparation Commission."

The treaty provides that "delegates to this Commission shall be nominated" by the United States, Great Britain, France, Italy, Japan, Belgium and the Serb-Croat-Slovene State; but that, of the seven delegates so named, not more than five shall take part in the proceedings and record their votes on any one occasion. The right to act and vote on all occasions is reserved to the delegates of four Powers, the United States, Great Britain, France and Italy; but the nominee of Belgium is to act as the fifth delegate, except on occasions when certain special "interests" would call for the substitution of the delegate of Japan or the delegate of the Serb-Croat-Slovene State. But the last named delegate has the right to sit only when questions relating to Austria, Hungary or Bulgaria are involved. The Japanese delegate replaces the delegate of Belgium when "questions relating to damage at sea," and questions involving "Japanese interests" in the partition of German financial interests in Russia, China, Turkey, Austria, Hungary and Bulgaria are under consideration. It follows that, if the United States had ratified the treaty and named its delegate, the Reparation Commission, in voting on the case of the tankers, would be composed of the delegate of the United States and the British, French, Italian and Belgian delegates, unless, indeed, on the ground that a question of "damage at sea" was involved, the delegate of Japan should be substituted for the Belgian delegate.

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Except as to certain questions the Reparation Commission decides "by the vote of a majority" (Treaty of Versailles, Art. 244, Annex II, par. 13). Among the exceptions requiring unanimity, the only one that could possibly apply to the case of the tankers is that of "questions of the *interpretation* of the provisions" of the reparation part of the treaty. But in this event the only power that the representative of the United States would have, assuming that the United States had ratified the treaty and was represented on the Commission, would be to create a deadlock. And what proviso is made for such an event? It is stipulated that the delegates shall refer their difference "*to their Governments,*" and that, if their Governments cannot agree, then "the question whether a given case is one which requires a unanimous vote for its decision," shall be referred to "the immediate arbitration of some impartial person." This is the sole extent of the reference. If the answer is in favor of unanimity, then the deadlock is restored unless the minority will give way. If the answer is against unanimity, the majority naturally will proceed to give effect to its contentions.

If further demonstration of the executive, non-judicial character of the Reparation Commission were needed, it would be supplied by the express declaration that, while it is to be "guided by justice, equity and good faith," it "shall not be bound by any particular code or rules of law or by any particular rule of evidence or of procedure." (Art. 244, Annex II, par. 11.) Obviously, with the wide area and national diversities involved, the Powers could not be expected to prescribe any single code or system of law for the uniform guidance of the Commission; but, where such diversities exist, it is the primary function and fundamental duty of all judicial tribunals, in deciding cases before them, to ascertain the applicable rule of law and to enforce it.

To what extent delegates, who have thus been emancipated from legal trammels, would be expected or permitted to compromise the interests of the governments which they represent, is a matter of conjecture concerning which it would be idle to speculate. Moreover, so far as concerns the particular question now under consideration, the conduct of the Powers has rendered such speculation superfluous. For, at no time, either before or since the signature of the treaty, have the Allied Governments, when they wished to determine questions of reparation, hesitated to exercise their power to do so. All the circumstances, including the manifest disregard of immediate reparation needs, show that the September "allocation," though nominally provisional, was intended to be formally

sanctioned by the Reparation Commission. Nor is this in any way remarkable; for it is an acknowledged fact that, in the allocation among themselves of German shipping, the Allied Governments have, through their chosen agencies, acted upon the principle that the use and management of the ships should be assigned to the Powers that were permanently to retain them. Such a course was, indeed, eminently wise and practical, since it avoided the prolongation of disputes between allies and friends in war. But, in thus directly adjusting their claims, the Allied Governments necessarily exercised the power to make among themselves divisions of tonnage which their delegates, composing the Reparation Commission, were expected afterwards permanently to register. Evidently, neither the terms of the treaty nor their own conduct precluded them from recognizing the claims of beneficial ownership.

On the other hand, in the light of what actually happened, how unfounded appears the supposition that the Standard Oil Company, in refusing unconditionally to agree to any action the Reparation Commission might take, transgressed the bounds either of right or of propriety! The Company was forced to defend itself. The September "allocation," whether tried by its terms, or by its antecedents, or by its disregard of temporary reparation needs, plainly constituted not only a direct denial of the Company's claim to the possession and use of the ships as their beneficial owner, but also an act of appropriation and division which was intended to be permanent. In their subsequent efforts to make this act effective, the Allied Governments, far from exhibiting incompetence to deal with the Company's claim, sought to defeat and destroy it. In these circumstances the Company could no longer rely upon the treaty stipulation,⁷ which enjoined upon the Reparation Commission due regard for the legal and equitable interests of nationals of Allied, Associated, and neutral Powers. The situation was not at all obscure. Back of the insistent demand for unconditional submission to the Reparation Commission, there evidently existed the purpose to effectuate through that body the contention that the Company, as beneficial owner, was entitled, not to the ships, but at most only to some pecuniary award for the loss of them; and, when the Reparation Commission should come to act, four out of its not more than five votes would be cast by the delegates of the four Allied Powers to which the September allocation, likewise made by their own agents, had already assigned almost the entire tonnage. The Company had no alternative but to invoke the protection of its Government.

7. *Supra*, p. 239.

16. FURTHER EFFORTS TO REACH A SETTLEMENT

The Company was confident that the justice of its position must be acknowledged; and this confidence was subsequently justified by the partial, though as yet unfulfilled, recognition of the essential validity of its claim.

On December 26, 1919, the Company received from its solicitor in London a telegram of the 24th of the same month, conveying a proposal of settlement which had been made to him by a representative of the British Government. The negotiations had taken place without the Company's knowledge or authorization; but they were undertaken by its solicitor, who was often in contact with the British shipping department in the hope of relieving a strained international situation and working out a solution of the controversy. The proposal presented to him was particularly objectionable in that it required (1) that the ownership of the eight tankers actually in commission should be temporarily vested in the British Shipping Controller and that they should be operated under the British flag, and (2) that any freight earned by them should be paid to the German Government. As there was no British claim of ownership that could justify the first requirement, a distrust of the United States and its agencies, as well as of the Company, appeared to be the only explanation of it. The second requirement was logically inconsistent with another clause in the proposal. This clause was as follows:

6. If the Standard Oil Company makes good its claim to the value of the tankers before the Reparation Commission, then the Allied and Associated Governments agree to satisfy such value by handing over and transferring the tankers to the Standard Oil Company under the American flag.

Of the somewhat singular form of this clause the explanation was given that for certain reasons, which need not be here detailed, the British representative was anxious that the claim before the Reparation Commission should be confined to the "value" of the tankers, instead of being made to the ships as ships, although, if the claim to the value was sustained, it would be "satisfied by handing over the ships."

Finally, it was proposed that, if the United States, having definitely refused to ratify the treaty, should be unrepresented on the Reparation Commission, the claim should be adjudicated by an "impartial tribunal" to be agreed upon by the interested parties.

This proposal was dispatched from London two days before the United States Shipping Board announced that the former German steamers which it had been detaining would be released, the *Imperator* having long since been discharged.

The Company, while deeming the proposal in its entirety to be unacceptable, promised to take it up with the Government of the United States. This was promptly done. For some time nothing more was heard. Besides, no response to the offer contained in the memorandum of the 29th of November had ever been received. Consequently, on January 8, 1920 the Company, much concerned at the delay, addressed to the Department of State a letter in which it expressed a desire for authoritative advices as to the actual posture of the matter and particularly as to what steps might be taken to effect an early and definite solution of the abnormal situation.

On January 12, 1920, the Company was acquainted with the contents of a proposal which the representative of the British Government, who had dealt with the Company's solicitor in London, had officially presented to the representatives of the United States in Paris, with the assurance that, although work on it was begun before the surrender of the steamers by the U. S. Shipping Board, "it was no less favorable to the United States" because of that fact.

The proposal, as officially presented at Paris, provided that if the Company should "make good its claim before the Reparation Commission or independent tribunal," the Allied and Associated Powers agreed "to satisfy the value of the claim by handing over and transferring the tankers" to it under the American flag. This clause, except in form, appeared to be identical with the corresponding clause in the proposal unofficially presented in London. It was also explained in the same sense, the representatives of the United States reporting that the proposal, if accepted, "definitely settled" that the Company's claim when proved was to be satisfied with "tankers," and that it was "so understood by the British." But the objectionable and illogical requirements as to the temporary vesting of title in the British Shipping Controller and the payment of freight to the German Government, still remained, and their objectionable character, in the implication of a want of confidence in the United States and its agencies, as well as in the Standard Oil Company, was accentuated by contrast with the favorable and friendly act of the United States in releasing the detained ships.

The Company, while recognizing the substantial importance of the offer to satisfy its claim with ships, stated that it was unable to reconcile with this offer the requirement as to temporary British ownership and the use of the British flag; that it regarded as wholly indefensible the proposal that any freight earned should be paid to the German Government; and that it could not think of any objection, which could properly be enter-

tained, to the turning over of the ships to the United States to be operated under the American flag.

Even admitting that, when the United States signed the Treaty of Versailles, there resulted a situation that enabled the other signatories to raise a question as to the method by which the ships, which were then still entitled to fly the German flag, should eventually be transferred to the American flag, this circumstance could not, in the Company's opinion, give the slightest support to the proposal that they should be transferred, even temporarily, to British ownership and put under the British flag. There was no direct British interest in them, either legal or equitable, that could justify such a demand; and its inadmissibility had just been further demonstrated by the recent act of the Allied Powers in declaring the treaty to be in force, without the ratification and participation of the United States.

Further negotiations have since taken place, in the hope that the British proposal might be so modified as to furnish the basis of a common accord; but definite assurances that this result will be attained are still lacking.

II. THE LAW

17. BENEFICIAL OWNERSHIP

The right of ownership, or *dominium*, in the full sense, has been described as a right, good against the rest of the world, "over a determinate thing, indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration."¹

Ownership, in this sense, completely unites *control* and *interest*; but, in order to meet human needs, it was found to be necessary to permit control and interest to be vested, at the same time, in different hands.

In consequence, the term "ownership" came to be used both in a complete and in a divided sense. While, in the full sense, it meant "the right by which a thing belongs to an individual to the exclusion of all other persons," it was held to "extend to the entire thing" or to a "limited" interest in it; and was broadly construed so as to protect all kinds of interests.

Thus, in the case of lands, it was determined that the "owner" was not necessarily one who held the fee simple, but might be the holder of a lesser estate; so that, under a statute giving compensation to abutting "owners" for damages caused by the change of grade of a highway, a tenant for life, for

1. Austin on Jurisprudence, Lecture XLVII; Strahan, *Law of Property*, p. 2.

years, or from year to year, might claim as an "owner." The same view was taken in condemnation proceedings.²

Again, a statute gave to the "owner or owners" of land sold for taxes a right of redemption within two years. It was held by the Supreme Court of the United States that the law ought to receive a "liberal and benign construction in favor of those whose estates will be otherwise divested," and that "any person who has any interest in lands sold for taxes" should be considered "as the owner thereof for the purposes of redemption." The court added: "Any right, which in law or equity amounts to an ownership in the land; any right of entry upon it; to its possession, or enjoyment, or any part of it, which can be deemed an estate in it, makes the person the owner, so far as it is necessary to give him the right to redeem."³

The most prevalent type, however, of divided "ownership," is the vesting in one person of the immediate control, for specified purposes, of property the financial interest in which belongs to another person. The former, according to the nomenclature of the English Common Law, holds the legal title; the latter, the equitable, it being the peculiar function of equity to ascertain the actual interest and to give it effect. Hence, the terms legal owner and equitable owner; and as the equitable owner, although not in immediate control of the property, is, as the possessor of the *actual and ultimate* interest in it, entitled to the profits or benefits gained by its use, he is also called the *beneficial owner*.

In this sense *beneficial interest* has appropriately been defined as the "ownership of an estate as distinct from the legal ownership or control."⁴

No principle is more firmly established, or more generally recognized and enforced, than that of beneficial ownership. So convenient has the vesting in a particular person, or organization, for certain specified purposes, of property beneficially belonging to another, proved to be, that much of the world's property is now held and a great part of its business conducted in this way.

The person in whom the legal title is vested holds to the property and to its beneficial owner the relation, technically or substantially, of a trustee; and while the trustee exercises control, the ultimate right to the property, as well as the present right to the profits derived from its use, belongs to the beneficial owner.

2. *American and English Encyclopedia of Law*, XXVIII, 234, and the many cases there cited.

3. *Dubois v. Hepburn* (1836), 10 Peters (U. S.), 1, 22, 23.

4. Bouvier, *Law Dictionary*.

The supposition—if indeed such a supposition can be anywhere entertained—that the interest of the beneficial owner does not reach the property itself; that it does not comprise the right to continued present enjoyment and ultimate possession of the property, but gives, as against a despoiler, at the most only a right to claim compensation for the resulting loss, is utterly destitute of foundation. Though subject to the conditions of the control, the right of the beneficial owner, since it proceeds from the substantial, or, in other words, the *lucrative* or *economic* interest, is necessarily fundamental. No doubt he may forbear to assert his rights, and elect to accept compensation for the relinquishment of his interest; but this must be wholly optional on his part, and he cannot lawfully be deprived of his right of choice.

18. CORPORATE ORGANIZATION; THE STOCKHOLDER'S RIGHT

At the present day the interest of the beneficial owner is most frequently assured through corporate organizations, whose adaptation to existing needs is demonstrated by the extraordinary spread of the modern business corporation.

The circumstances of the present case render superfluous a minute theoretical discussion of the legal conception of a corporation and of the extent to which it may be considered as possessing, for one purpose or another, a "legal personality." The corporate association of individuals for business and other purposes among the Romans, and the views taken then and in later times as to the effect of such association, are learnedly discussed in many treatises. But we are here concerned only with the fundamental rights of property, and, while there may be variations in theory and in practice as to the extent to which the corporation may itself have "rights" or "personality," there is no diversity of opinion as to the principle that the property of the corporation belongs to its security holders, and that, subject only to the claims of creditors, they are entitled to it as against the rest of the world.

During the middle ages, before the development of the modern business corporation, the corporate association with which the European world was familiar was that of ecclesiastical societies. The engrossment by these corporations of vast estates in permanent tenure resulted in the adoption of measures for their dissolution. The avowed purpose of those measures was, not only to take the property from the corporation, but to restore it to the public; and with this conscious design it was held that, upon the dissolution of the corporation, its real estate reverted to the original grantors, while its personalty escheated to the crown.

With the tendency, which judges have sometimes exhibited, to be governed by the letter rather than by the spirit and purpose of legal rules, the common-law courts, when they first came to deal with the modern business corporation, were much perplexed by the precedent set in the ecclesiastical cases. Gradually, however, they came to recognize the fact that the purpose in those cases was confiscatory and that the rules laid down to effect that design could have no application to a business corporation.

The final result in this transition is recorded in the leading case of *Foss v. Harbottle* (1843), 2 Hare, 491, in which that eminent judicial magistrate, Sir James Wigram, as Vice Chancellor, laid down the law to the effect that private corporations were "in truth little more than private partnerships," and that it would

be too much to hold that a society of private persons associated together in undertakings which, though certainly beneficial to the public, are nevertheless matters of private property, are to be deprived of their civil rights *inter se*, because, in order to make their common objects more attainable, the crown or legislature have conferred upon them the benefit of a corporate character.

The same question was soon afterwards dealt with by the Supreme Court of the United States, in the case of *Bacon v. Robertson*. A Mississippi court, on an information in the nature of a *quo warranto*, had entered a judgment against the Commercial Bank of Natchez, declaring its charter to be forfeited and appointing a trustee to take over its property, on the ground that it had suspended specie payments. By the laws of the State, in such case, any surplus, after payment of the bank's liabilities, was directed to be "ratably distributed among the stockholders." But, owing to the want of adequate common-law precedents for the distribution of corporate assets, after a dissolution by *quo warranto*, the judges found much difficulty in giving effect to that direction, especially in view of early judicial utterances to the effect that, where a corporation was dissolved, the debts, whether due by or to the corporate body, were extinguished so that they were neither a charge upon nor a benefit to the members. In these circumstances, some of the bank's stockholders filed a bill against the trustee in the United States courts to establish their title to the surplus and to obtain their ratable shares. The trustee, demurring, confessed that he had received the estates, but claimed that, since the dissolution, the stockholders had no rights. The judgment of the Supreme Court of the United States was rendered by that able and eminent judge, Mr. Justice Campbell, who, citing what he termed the

"just views" announced in *Foss v. Harbottle*, said that they had been adopted in the United States, where, as in Great Britain, the tendency of the courts was "*to concede the existence of a distinct and positive right of property in the individuals composing the corporation, in its capital and business*," and to hold that, while the capital and business were "subject in the main to the management and control of the corporation itself," yet cases might arise "where the corporators may assert not only their own rights, but the rights of the corporate body." Continuing, the learned justice said:

The money, evidences of debt, lands, and personalty acquired by the corporation were purchased with the capital they lawfully contributed to a legitimate enterprise conducted under legislative authority. The enterprise has failed under circumstances, it may well be, which entitle the State to withdraw its special support and encouragement; but the State does not affirm that any cause for the confiscation of the property, or for the infliction of a heavier penalty, has arisen.⁵

The same principle, applied in a multitude of cases, has been well expressed in a treatise of high authority, as follows:

While a corporation may, from one point of view, be considered as an entity without regard to the corporators who compose it, the fact remains self-evident that a corporation is not *in reality* a person or a thing distinct from its constituent parts. The word "corporation" is but a collective name for the corporators or members who compose an incorporated association; and where it is said that a corporation is itself a person, or being, or creature, this must be understood in a figurative sense only. . . .

In equity the conception of a corporate entity is used merely as a formula for working out the rights and equities of the *real parties in interest*, i. e., the shareholders. . . .

Even in those cases in which only corporate rights and obligations are involved, and the corporation is nominally interested only as an entity, the courts are constantly obliged to consider that the real persons in interest are the individual shareholders. . . .

The fact that a legal title of a corporation to property held by it becomes extinguished by a dissolution, is no reason why the beneficial owners should lose their rights. . . .

The judgment of forfeiture of franchises against a corporation, in a proceeding by *scire facias* or *quo warranto*, "can reach only the corporate franchises: this may be declared extinguished; but property rights cannot be confiscated by the State, or prevented from devolving according to the ordinary rules of equity and the common law."⁶

5. *Bacon v. Robertson* (1855), 18 Howard, 480, 485, 486, 487-488.

6. Morawetz on Private Corporations (2d ed.), I, 2, 222, 225, 231; II, 990, 991. See also Fletcher, *Cyclopedia of the Law of Private Corporations* (1919), VIII, Sec. 5593, p. 9190.

It has accordingly been held, for example, that a shareholder has an insurable interest in the corporate property; and that shareholders may sue for the purpose of requiring, even against the acts of a majority, the corporate assets to be used and the business to be conducted in conformity with the purposes of the incorporation.⁷

This principle has been clearly and forcibly stated in a case lately decided in Kentucky, in which the court declared: "Corporations in this country are simply aggregations of men for the purpose of conducting business, and, for the convenience of those interested in the business, are substituted for partnerships."⁸

The courts will not hesitate to look behind the corporate entity and to the persons who compose it.⁹

The same rule prevails in Germany. The stockholder can sue the corporation or the directors for violation of the law or of the company's by-laws.¹⁰

This right was notably exercised in the case of the Roumanian Railway Company of Berlin. By an agreement with the Roumanian Government, this company, a German corporation, which had a railroad in Roumania, made a contract with the Roumanian Government by which it agreed to permit that Government to operate the railroad and manage its finances during the life of the concession, the Government agreeing to issue, in exchange for the stock of the Company, Roumanian Government bonds secured by a mortgage on the railway. This contract was made by the directors of the Company, and was afterwards ratified by a majority of the stockholders at a stockholders' meeting. A minority stockholder, who had protested against the action both of the directors and the stockholders, brought a suit against the directors to have their resolution, which the stockholders had approved, declared void, and to enjoin any further proceedings to carry the resolution into effect. It appeared that, in order to carry the resolution into effect, a change in the by-laws of the company would be necessary. It was *held* (1) that with respect to a non-assenting stockholder, such a change in the purposes of

7. Morawetz, I, 225, *Dodge v. Woolsey* (1855), 18 Howard, 331; *Hawkes v. Oakland* (1881), 104 U.S., 450; *Flynn v. Brooklyn City R. Co.* (1899), 158 N. Y., 493, 507, 53 N. E., 520; *Rogers v. Nashville, etc. R. Co.* (1899), 91 Fed. Rep., 299, 33 C. C. A., 517; *Pollitz v. Gould* (1911), 202 N. Y., 11, 94 N. E., 1088.

8. *Merchants Ice & Cold Storage Co. v. Rohrman*, 128 S. W., 599, 601.

9. *Chicago, M. & St. P. Ry. v. Minn. Civic Assn.* (1917), 247 U. S., 490; *Daimler Co., Ltd., v. Continental Tyre & Rubber Company, Ltd.*, L. R. (1916), 2 A. C., 307.

10. Commercial Code, Secs. 271, 272.

the company was *ultra vires*, and that he had a right of action to protect his interest against impairment; (2) that the "community of interests of all the stockholders constitutes a guarantee to the individual stockholder, that the resolutions adopted by all the stockholders with regard to corporate property will correspond (not be adverse) to his interests"; (3) that the right of the plaintiff to bring the action was "recognized by reason of his possession of stock in the capacity of a stockholder"; and (4) that "by reason of the invalidity of the corporate resolution," the company was "under a duty to the plaintiff not to carry it into effect."¹¹

In Germany, as elsewhere, there has been much debate between the respective advocates of what the Germans call the "real" theory and the "fiction" theory of the corporation; but, on the continent of Europe, as elsewhere, the fundamental character of the stockholder's right is recognized without regard to the degree of "personality" attributed to the corporation.

As Saleilles, the eminent French jurist, who has critically examined the German writers, and who leans toward the "real" theory, remarks, behind the corporation there everywhere appear the individuals who have united to constitute a "collective ownership" and have contributed their private property to its establishment.

Wherever [says Saleilles] there exists property furnished by the private resources and affected to the use of those who have created it, one can never say that the beneficiaries as a whole are not, in reality, the sole and true owners, whatever be the legal owner, that being only a cloak or name (*prête-nom*) to cover the true owners (enjoyers of the right, *avants-droit*). One does indeed assign to the "legal owner" the attributes of property, so long as he (it) uses it in the interests of the contributors (*affectataires*) and in the sense of the original contribution. So soon as he (it) undertakes to go beyond and believes himself (itself) empowered to dispose of the property at his (its) pleasure as would a true owner, the real contributors (*affectataires*) protest and claim, as against the "legal" property which was only an illusion (appearance), *their own actual property*, the only true property, which is confounded with the affectation to use, itself, or rather, with the object which it was to serve.¹²

So the German jurist, Dr. Fischer, collaborator on the law

11. Decision of the German Supreme Court (January 19, 1881), R. G. III, No. 39, 123. See also Holtzendorff, *Rechts-Encyklopädie*, III, 61, and Supreme Court decision R. O. H. G., xxii, 281; and Gierke, *Genossenschaftstheorie*.

12. Saleilles, *Personalités Juridiques* (Paris, 1910), p. 217. See also, *idem*, 185, 188, 191, 229.

of corporations in the recent monumental work on commercial law edited by Professor Ehrenberg, says :

The affairs of the corporation are at the same time the affairs of the stockholders ; the difference between them (the respective affairs) is purely legalistic and formal (*juristisch-formal*). We must not overlook the fact, in dealing with the independence of the juristic person that the juristic person is in principle *nothing more than a form of association* of individuals, by which these associates are enabled to pursue their common interests.¹³

To the same effect is Professor Lehmann, probably the leading modern German authority on practical corporation law, who says :

The corporate capital is contributed by the members for the usual purpose of obtaining profits and after its dissolution to take the capital over.¹⁴ The corporate capital is therefore economically (*wirtschaftlich*) the capital of the members. Herein lies the really difficult point. Out of the circumstances that juristically and formally (*formal juristisch*) a special organism (*Lebewesen*) is present, which in a material sense and economically (*materiell wirtschaftlich*) only operates by the will of the members and for the members, peculiar consequences arise which, although they are not inconsistent with the nature of juristic personality, are foreign to the ideal and prevailing normal type of juristic personality.¹⁵

Renaud, quoting Jolly, observes, with reference to the stock company, that, while it has a unitary personality, *the stockholders are the true owners of the corporate property*, although they cannot be regarded as pure (*reine*) *condomini*, in the sense of the Roman law, because formally the corporation is deemed to have title to the property.¹⁶

The citations are not made from the many German authorities who deny juristic personality to the corporation and therefore deem the stockholders to be direct and immediate co-owners of the corporate property, such as Pöhls, Treitschke, Sintenis, Rosler, Randa, Primker and Canstein,¹⁷ but from authorities who most strongly maintain the theory of the juristic personality of the corporation as distinct from the persons of its stockholders.

Even Gierke, the father of the "real" theory of the corpora-

13. *Handbuch des gesamten Handelsrechts* (Leipzig, 1916), III, 357.

14. See decision of the German Supreme Court (February 1, 1882), R. G. VI, No. 18, 69.

15. *Recht der Aktiengesellschaften* (Berlin, 1898), I, 243.

16. Renaud, *Das Recht der Aktiengesellschaften* (2nd ed. Leipzig, 1875), p. 69.

17. See Lehmann, *op. cit.*, p. 237.

tion, declares that the "membership rights" of the stockholder "have their root in the share of the stockholder in the property (*Vermögen*) of the corporation; his personal rights are outflows of those basic property rights."¹⁸

Although the right expressed in a share of stock manifests itself practically in a claim to a proportionate share of the dividends and in expectancy to a proportionate share of the capital, the right of the individual stockholder "has received increasing recognition in practice."¹⁹

By the German Commercial Code, the stockholders (Sec. 213) have a right to the profits; and on liquidation, they are (Sec. 300), after payment of creditors, entitled to a division of the property in proportion to their shares.

The stockholder has "inherent claims to a proportionate part of the corporate capital as well as to dividends."²⁰

His "claim to the profits" rests on his share "in the corporate property."²¹

How could the stockholder's right to the enjoyment of the corporate property be more conclusively acknowledged than by admitting his unassailable right to dividends and to a distribution of the assets on dissolution? Dividends are the fruit of capital and its use, and to admit the *right* to dividends and the *duty* of the company to pay them when earned, is necessarily to admit that the assets beneficially belong to the individuals to whom belong the profits. To say that the individual beneficiary cannot at will withdraw his part of the common fund, is beside the point. Such withdrawal would be contrary to the agreement under which the fund was created, and would enable the individual contributor to break up the enterprise at any time. Instead, he is allowed to dispose of his interest without withdrawing his contribution, his successor in interest taking his place as beneficial owner.

English juristic authorities are no less clear on the subject.

Maitland, while remarking that, although the "real" theory "may seem to carry its head among the clouds," "a serious effort has been made to give it feet to walk upon the earth," inquires: "When all is said and done, . . . are not these shareholders, these men of flesh and blood, the real and only sustainers of the company's rights and duties?"²²

Austin speaks of "fictitious and legal persons"; Holland, of

18. Freund, *Legal Nature of Corporations*, citing Gierke in Holtzendorff, *Rechts-Encyklopädie*.

19. Gierke, *Genossenschaftstheorie*, p. 245.

20. Renaud, *op. cit.*, p. 100.

21. Lehmann, *op. cit.*, p. 247.

22. Maitland, Introduction to Gierke, *Political Theories of the Middle Ages*, XXIV, XXX.

"persons in an artificial sense"; Pollock, of "a fictitious substance conceived as supporting legal attributes."²³

The same view is maintained by Baty,²⁴ who cites, among other authorities, the great Belgian jurist, Laurent.

Laurent, who discusses the subject with great elaboration, observes that, while the members (stockholders) of business corporations have in view only their profit, yet, as the wealth of individuals is the source of the public wealth, the formation of such organizations has been legally authorized and encouraged; and that, in order to enable them to obtain the necessary capital for great enterprises, as well as to manage their affairs efficiently, they have been endowed with a certain "personality," often accompanied with a limitation of the members' individual liability. But it is not, remarks the learned jurist, therefore to be inferred that these juridical "persons" are, like natural persons, "infected with original sin" and "exposed to Hell-fire if without the sacrament of baptism," or that they are, on the other hand, subject to the injunction to be "perfect, as is your Father in Heaven." They are permitted to occupy a middle ground. They do not possess "rights" and enjoy property in the same sense as real persons do, but have only the faculties with which they are specially endowed for the attainment of the objects of their creation. They have *administrative* rather than *proprietary* rights, and can dispose of their goods only within the limits of their charter.²⁵

In the United States, a profound student of the law and of legal history, remarking that, "strangely enough," the fact has not always been clearly perceived "that transacting business under the forms, methods and procedure pertaining to so-called corporations is simply another mode by which *individuals and natural persons* can enjoy their property and engage in business," quotes with approval, from what he declares to be "one of the best judicial utterances on the subject," this statement: "When all has been said, it remains that a corporation is not *in reality* a person or thing distinct from its constituent parts, and the constituent parts are the stockholders, as much so in essence and in reality as the several partners are the constituent parts of the partnership."²⁶

23. Holland, *Jurisprudence* (8th ed.), p. 82; Pollock, *Contract* (6th ed.), p. 108; Maitland, *op. cit.*, XXI.

24. *Harvard Law Review* (January, 1920), p. 358.

25. *Droit Civil International*, IV, Secs. 72, 80, 82, 101, 119 *et seq.*, 128.

26. Prof. W. N. Hohfeld, "Nature of Stockholders' Individual Liability for Corporation Debts," *Columbia Law Review*, IX (1909), 285, quoting Mr. Justice Spear in *Cincinnati Volksblatt Co. v. Hoffmeister* (1900), 62 Ohio State, 189, 200, 56 N. E., 1033, 1035.

The result of this summary is to demonstrate that the great jurists who have examined this particular matter are in accord in holding (1) that the stock corporation, or limited liability company, is, like a partnership, merely a form of association in which the individual members combine their resources, under certain legal conditions, in order thus to enjoy their property; (2) that, while the formal legal title is in the corporation, the beneficial ownership of the corporate property is in the natural persons to whom the profits earned by its use belong; (3) that, except as against creditors, the beneficial owners are entitled, as against the rest of the world, to the possession, use and enjoyment of the corporate property through the instrumentality which they have adopted for that purpose; (4) that any loss resulting from the diminution or taking of such property is to be regarded as falling, as it in fact falls, not on the corporate instrumentality, but on the beneficial owners, the only beings whose property and rights are at stake.

The shareholder's property interest in no respect depends upon the possession of voting power. In this regard, shares or interests in the corporate stock are of great variety. Except as restrained by public policy, the stockholders may make any agreement they like in regard to voting power. Non-voting stock may even represent a superior or preferred interest in the corporate property and its earnings. The law has recognized different varieties of interest, without regard to voting power, in respect of "dividend" stock, "scrip" stock, "redeemable" stock, "full paid" stock, "debenture" stock, and various kinds of "special" stocks, guaranteed and non-guaranteed. Interests in the corporate property and business may possess voting power, or may lack voting power, or may be divided into classes having different voting powers.²⁷

27. Fletcher, *Cyclopedia of the Law of Private Corporations* (1919), Secs. 5600, 5601; Thompson on Corporations (1909), Secs. 3425, 3428, 3430, 3431, 3432, 3437, 3439; IV, 45, 47, 49, 50, 54, 57; *Hamlin v. Toledo etc. R. R. Co.*, 78 Fed. Rep., 664; *General Investment Co. v. Bethlehem Steel Corporation* (1917), 87 N. J. Eq., 234, 100 Atl., 347; 88 N. J. Eq., 237.

The court in the last mentioned case quotes Thompson on Corporations, Sec. 3425, as saying that, "while stock is usually divided into common and preferred," yet these "two classes are again subdivided into almost an infinite variety."

The English Companies (Consolidation) Act, 1908, 8 Edw. 7, chap. 69, Sec. 81, in prescribing what a corporate prospectus must state, includes: "(n) where the company is a company having shares of more than one class, the right of voting at meetings of the company conferred by the several classes of shares respectively."

19. INTERNATIONAL RECOGNITION AND DIPLOMATIC
PROTECTION OF BENEFICIAL INTEREST

The fundamental right of the beneficial owner is recognized and protected in international law as well as in municipal law.

This fact has been strikingly exemplified in recent years in international cases in which it was sought to interpose the corporate entity as a bar to intervention by a government for the protection of beneficial interests of its citizens which were sacrificed or injured by unjust administrative or judicial acts.

It is superfluous to remark that no one denies that there is such a thing as a corporation, or that, whether it be called a "legal entity," a "legal personality" or what not, it is regarded as possessing, by virtue of its attachment to some place, in a certain sense "nationality." Nor does any one deny that, whether this "nationality" be described as "citizenship," as "domicil," or as "residence," and whether it be determined by the place of origin or organization, by the place of conducting operations or by any other circumstance, it is recognized in legislation, in judicial decisions, in arbitral agreements and awards, and in diplomatic practice. Though the conception is artificial, it is a convenient fiction, which serves a useful and practical purpose. Nor is this artificial attribution of "nationality" confined to corporations. In France, in Italy, in Belgium, in Spain, and in most of the Spanish-American countries, juristic "personality," with corresponding juristic "nationality," is attributed to all commercial associations, including partnerships, general and limited, as well as to co-operative associations and stock companies.²⁸ But it by no means follows that the partners or shareholders have lost either their beneficial ownership of the property or the right to be protected in such ownership. Such an assumption would be clearly illogical and violent.

On the other hand, the fact is to be borne in mind that, from the point of view of the government whose protection is invoked, intervention is not a matter of *obligation*, but is a matter of *discretion*, to be determined exclusively by the government itself, on grounds of general public as well as of particular private interest, under all the circumstances of the case. It is therefore not strange that the way in which property is held and used should be found among the considerations which have been weighed by governments in deciding what they should do.

28. Lyon-Caen and Renault, *Traité du Droit Commercial* (3d ed. 1898-1903), Vol. II, Sec. 105.

According to one view, the legal title to the corporate property being in the corporation, the owners of the latter's securities, whether in the form of stocks or of bonds, were not supposed to have a standing in the international forum, but, being regarded merely as holders of certificates of interest in the corporate assets, in case such assets should be distributed, were supposed to look only to the corporation and through it indirectly to the government under which it was formed, for the assertion and preservation of their rights. Perhaps the case most frequently cited in support of this view is that of the steamer *Antioquia*, in 1866; but, on examination, it will be found that the reasons given were characterized by special pleading, and that any one of them might have been omitted without affecting the conclusion that was reached. Perhaps all of them might have been omitted except the circumstance, which was intimated but not emphasized, that the case was regarded as one for adjudication by the courts. A brief summary will suffice to show that the decision is quite irrelevant to the case of the D. A. P. G. tankers.

The *Antioquia* belonged to a Colombian corporation less than a half of whose stock was owned by citizens of the United States. The next largest interest was held by British subjects, while the rest was divided between citizens of Hamburg and Colombians. The steamer was seized by the Colombian Government, in Colombian waters, during a revolution, on the ground (1) of an alleged infraction of an order forbidding the transportation of political suspects, and (2) of military necessity, for the transportation of troops. The Colombian Government afterwards offered to return the steamer and make compensation, but, failing an agreement on terms, directed that the case be submitted to the courts. To this the owners objected, and the American shareholders appealed to their Government. In answer to their petition Mr. Seward, as Secretary of State, intimated that they should not object to submitting to the Colombian courts, but he then proceeded to argue that, while the confiscation of their shares, specifically as the property of Americans, would justify intervention, yet, as the general title to the property was not in the shareholders but was in an entity that was to be "assimilated to a citizen of Colombia," it was for the latter, if it had sustained a wrong, to pursue such remedies as a private Colombian might do, without the aid of a foreign government. He suggested the hypothesis of an intervention by Great Britain, France and Russia in behalf of their respective subjects, all stockholders in an American national bank, who might feel aggrieved by the operations of the Government, and enlarged upon the end-

less complications that might ensue if each Government should insist on a different mode of adjustment or measure of damages. Moreover, probably influenced by the prevalent feeling regarding absentees during the then recent American civil war, he intimated that it was not a "wise policy" to "encourage the employment of American capital abroad" by extending to it "any protection" beyond what the "strictest obligation" required, or to "enlarge the capacity" of Americans "domiciled abroad for purposes of mere pleasure, ease, or profit, to involve this Government in controversy with foreign powers," particularly in the South American States, where the number of companies, such as that in question, tended yearly to increase, without any sensible diminution of "their exposure to the hazards of intestine commotion." He was, he declared, "sufficiently impressed by these considerations to pause for further information," especially as the affair appeared to be in an unobjectionable way of adjustment, unless the claimants impeded it.²⁹

The pronouncement in the case of the *Antioquia* evidently savors of the times in which it was made. It was avowedly designed to discourage the employment of American capital abroad, and to this end was intended to confine protection within the narrowest possible limits. The application of this deterrent influence was declared to be specially important in the quarter in which the claim arose. The substantial interest of the claimants was not denied, but only the duty, or perhaps the necessity, in the circumstances, of protecting it by diplomatic action. It was confessedly desired to reach this conclusion, and arguments were sought to support it.

A somewhat similar case is that of the "Compañía Salitrera del Peru," a Peruvian corporation in which certain American citizens held shares. Mr. Freylinghuysen, as Secretary of State of the United States, in 1884, declined formally to intervene in their behalf as against the Government of Chile, but tendered the good offices of the United States. Again, the substantial interest of the American shareholders was not denied. The question dealt with was the method and extent of its diplomatic protection.³⁰

But it was inevitable that, with the increased use of the corporate form for the transaction of industrial and commercial business, and the extensive use of that form by foreign investors in large industrial and commercial enterprises, situations should arise in which not only the governments of

29. *Diplomatic Correspondence of the United States*, 1866, III, 522.

30. Moore, *International Law Digest*, VI, 646.

such investors, but also other governments, would look beyond the form to the substance and insist upon dealing with the corporate property on the basis of the beneficial or economic interest, rather than on that of the legal or technical interest.

The leading case of intervention in behalf of the foreign beneficial owners of property legally belonging to a domestic corporation is that of the Delagoa Bay Railway.

The original concession for the building of this railway was obtained from the Portuguese Government in 1883 by a citizen of the United States named Edward McMurdo, the centre of whose financial activities was London.

By the terms of the concession McMurdo was required to form a Portuguese company. He formed such a company, and assigned to it his concession, receiving therefor 498,940 out of the 500,000 shares of capital stock. By the same instrument he agreed to construct the road, in consideration of the issue to him by the company of all its debenture bonds, amounting to 425,000 pounds sterling.

Being unable to float these bonds, he made in 1887 an arrangement with English capitalists to obtain money. Under this arrangement an English company was formed, with a share capital of 500,000 pounds sterling. To this company McMurdo assigned all his shares and bonds of the Portuguese company, the English company agreeing to indemnify him in respect of the obligations of his contract, to pay him a certain sum of money, and to give him all its shares. The English company then issued its own debenture bonds to pay McMurdo and to finance him in the building of the road.

The road was completed in accordance with the original plans and specifications, but, while it was accepted by the Portuguese Government, it was accepted with a reservation as to the final terminal point and the further extension of the line. Controversies over this extension led to the taking over of the road by the Portuguese Government in June, 1889.

The United States, being of opinion that this action was not justified, intervened in behalf of the original concessionaire, and informed the Portuguese Government that it would "demand and expect the restoration of the property or indemnity" for the losses resulting from its seizure.

In the course of a comprehensive instruction to its Minister at Lisbon on November 8, 1889, the United States maintained that the seizure of the road was in effect an act of confiscation, and that, the Portuguese company being without remedy and having practically though not legally ceased to exist, "the only recourse of those *whose property has been confiscated*" was "the intervention of their respective Governments."

The British Government took the same position, maintaining that the Portuguese Government "had no right to cancel the concession nor to forfeit the line already constructed"; that the action of the Portuguese Government had "*violated the clear rights and injured the interests of the British company,*" which was powerless to prevent it, and which, as the Portuguese company was "practically" defunct, had "no remedy except through the intervention of its own Government"; and that "*British investors*" had "suffered a grievous wrong in consequence of the forcible confiscation . . . of the line and the materials *belonging to the British company, and of the security on which the debentures of the British company had been advanced.*"

The Portuguese Government, contesting the grounds of the intervention, not only denied that the taking over of the road was an act of confiscation, but also contended that, while Portugal was on the one hand legally a stranger to the British company, the Portuguese company was on the other hand in an effective legal position to defend the interests which it represented.

The American and British Governments declined to accept this view.

The United States specifically instructed its Minister at Lisbon to say to the Portuguese Minister of Foreign Affairs:

The United States will not permit the property of American citizens to be seized and appropriated by any other government.

Subsequently a protocol was made between the three Governments by which it was agreed that, while the road should be left with the Portuguese Government, an international tribunal should determine the amount of compensation to be paid for its seizure.

The submission was made, and an award of compensation was duly rendered.

After the award was made, an incident occurred which again illustrates the principle of beneficial interest. The arbitrators, in rendering their award, set aside no particular sum for McMurdo, the American claimant; and it was found that the entire amount of the award, which was promptly deposited by Portugal in a London bank, was covered by the debentures of the English company, which, technically, took precedence of the stock. The United States thereupon at once gave notice that, unless an equitable allowance was made to the American claimant, the American Government would not hold itself bound by the award. An arrangement between the holders of

the bonds of the English company and the American claimant was then effected, under which the latter received an allowance for his interest.³¹

This precedent was soon followed in the case of the Salvador Commercial Company, also known as the case of El Triunfo Company, Limited, the facts of which are as follows:

In 1894 the Government of Salvador granted a concession for the development of steam navigation at the port of El Triunfo. This concession was assigned to a Salvadorean corporation, called "El Triunfo Company, Limited," having a capital stock of \$100,000, consisting of 1,000 shares of \$100 each. Of these shares 501 were owned by the Salvador Commercial Company, a California (U. S.) corporation.

By fraudulent acts, the Salvadorean directors of El Triunfo Company in 1898 caused it to be declared bankrupt, and subsequently, while the majority stockholders were taking steps to have this decree set aside, the President of Salvador, on the strength of the alleged bankruptcy, declared the concession to be annulled and the port to be closed. The United States then intervened.

The Salvadorean Government denied the right of the United States to intervene, basing its denial on the ground, among others, (1) that the injury alleged to have been done was done to a Salvadorean corporation, and (2) that by the original concession the right to invoke diplomatic intervention was expressly renounced. The Salvadorean Government, however, offered to raise the judgment of bankruptcy and rehabilitate El Triunfo Company if the claimants would agree to "an equitable and reasonable settlement of the whole question." The United States, on the other hand, insisting on its right to intervene, demanded that, in addition to the reinstatement of El Triunfo Company, there should be an assessment of damages, out of which the Salvador Commercial Company should be paid a sum proportionate to its share-holdings in the former company. At length a compromise was reached. This compromise was embodied in a protocol signed December 19, 1901, by Mr. Hay, Secretary of State of the United States, and by the Minister of Salvador at Washington, by which the controversy was referred to an international board of arbitration, to consist of a citizen of the United States, a citizen of Salvador, and the Hon. Henry Strong, Chief Justice of Canada. By this protocol it was agreed that the tribunal, if it should "find that any liability is established," should award damages that

31. See *Foreign Relations of the United States*, 1902, pp. 848-852; Moore, *International Arbitrations*, II, 1865-1899.

should be "fully compensatory" for the loss incurred. On May 8, 1902, the board, the Salvadorean member dissenting, rendered an award in favor of the United States for \$523,178.64, this sum embracing the Salvador Commercial Company's proportionate part, according to its ownership of shares, of the estimated value of the annulled concession and franchise; a similar part of the value of certain movable property of El Triunfo Company; and an allowance for claimant's expenses and counsel fees.

Chief Justice Strong, in an opinion rendered in support of the award, said:

We have not discussed the question of the right of the United States under international law to make reclamation for these shareholders in El Triunfo Company, a domestic corporation of Salvador, for the reason that the question of such right is fully settled by the conclusion reached in the frequently cited and well-understood Delagoa Bay Railway Arbitration.³²

The diplomatic protection of beneficial interests is further exemplified in the celebrated case of Alsop & Co., in which a final decision was rendered by His Majesty King George V, July 5, 1911. As stated in His Majesty's award, Alsop & Co. was a company *en comandita* formed and registered in Chile by citizens of the United States, its seat of business being in Valparaiso. The claim made in the name of the company arose out of a transaction in 1876. In that year the company, being in liquidation, entered through its liquidator, a Mr. Wheelright, into an agreement with the Peruvian Government for the settlement of a debt growing out of transactions between that Government and a Brazilian citizen. This debt had been assigned to Alsop & Co. It was intimated that the debt, so far as any existed, had passed to Chile by reason of her assumption of certain liabilities of Bolivia under a treaty between the

32. *Foreign Relations of the United States*, 1902, pp. 838, 839-842, 861, 873.

The original demands of the United States in the case of the Salvador Commercial Company, as incorporated in instructions to the United States Minister in Salvador, were based on a memorandum prepared by the Solicitor of the Department of State, in which there is the following passage: "While the Department does not dispute the contention that intervention by the Government of the United States would not be in entire accord with certain dicta expressed in the case of the *Antioquia* in respect of intervention in behalf of American stockholders in a foreign corporation, it is consistent with the actual grounds of that decision. But if all the reasons stated in that case against the right of intervention were to be accepted, even if intervention had been refused solely on the academic reasons given, the decision of this case would be controlled by the later decision of the Department in the case of the Delagoa Bay Railway."

two States. The amount of the debt was disputed, and, on the ground that the American citizens composing the firm could assert their rights only through the company, which had a Chilean nationality, the Chilean Government contested the right of the United States to intervene. Subsequently the claim was laid before a board of arbitration, under a protocol between the United States and Chile, by which the board was empowered to adjudicate the claims of "corporations, companies or private individuals, citizens of the United States," upon the Government of Chile, and reciprocally the claims of "corporations, companies or private individuals, citizens of Chile," upon the Government of the United States. A majority of the arbitrators, holding that Alsop & Co. was a "Chilean society, and as such, a citizen of Chile," decided that the board had, under the terms of the convention, no jurisdiction of the claim. The Chilean Government, while not denying that an indebtedness existed, urged the decision of the arbitrators in denial of the right of intervention. The United States replied that the dismissal of the claim was due to "the peculiar wording of the protocol" under which it was submitted, and continued to insist on a settlement. By a protocol between the two Governments on December 1, 1909, it was left to His Britannic Majesty, as *amiable compositeur*, to "determine what amount, if any, is, under all the facts and circumstances of the case," equitably due to the claimants. The award of His Majesty was based on the report of an eminent commission of three persons. This report speaks of His Majesty as having consented to act as "arbitrator" and states that the function of an *amiable compositeur* was to pronounce "an award which shall do substantial justice between the parties without attaching too great an importance to the technical points which may be raised on either side." With reference to the question of the right of the United States to intervene, the report, which is incorporated in His Majesty's award, after adverting to the discussions between the two Governments, and the decision of the board of arbitration, says:

The Chilean Government, in the case presented to Your Majesty, again suggest that, as the firm was registered in Chile, and is a Chilean company, their grievances can not properly be the subject of a diplomatic claim, and that the claimants should be referred to the Chilean courts for the establishment of any rights they may possess.

We hardly think that this contention is seriously put forward as precluding Your Majesty from dealing with the merits of the case. It would be inconsistent with the terms of the reference to Your Majesty, and would practically exclude the possibility of any real decision on the equities of the claim put forward.

The remedy suggested would probably be illusory, and, so far from removing friction, an award in this sense, transferring the real decision from an impartial arbitrator with full powers to the courts of the country concerned, which in all probability have no sufficient power to deal equitably with the claim, could afford no effective solution of the points at issue or do otherwise than increase the friction which has already arisen between the two States.

We are clearly of opinion, looking to the terms of reference and to all the circumstances of the case, that such a contention, if intended to be seriously put forward by Chile, should be rejected. We think that it may be disregarded by Your Majesty.

Probably the use of the title *amiable compositeur* has contributed to the impression, of which traces are sometimes found, that the consideration of the right of the United States diplomatically to protect the beneficial interest of its citizens was expressly excluded by the terms of the protocol; but it is evident that this was not understood to be so either by the Chilean Government or by the arbitrator and his advisers. Although they declared that to hold that the Chilean nationality of the company precluded the arbitrator from "dealing with the merits of the case, . . . would be inconsistent with the terms of the reference," they also declared that an award in the sense of the Chilean contention "could afford no effective solution of the points at issue or do otherwise than increase the friction" which had already arisen between the two States. The intimation that they were unable to regard the contention as seriously put forward only emphasizes their opinion that, as the beneficial interest could not be otherwise assured, the case was one for international settlement. An award was made of 2,275,375 bolivianos as the amount "equitably due."³³

The protection of a pecuniary interest by diplomatic action, without regard to technical rules, was carried to an unusual length in the case of the Orinoco Steamship Company. This company was a corporation organized by citizens of the United States under the laws of the State of New York, in January, 1902. On April 1, 1902, the company purchased and took over all the property, franchises, claims and demands of the Orinoco Shipping and Trading Company, Limited, a British corporation doing business in Venezuela. Among the assets so transferred were certain debts alleged to be due by the Venezuelan Government. On February 17, 1903, a protocol was concluded between the United States and Venezuela, by which it

33. *Foreign Relations of the United States*, 1910, pp. 148, 161; *idem*, 1911, pp. 38, 41-42, 53; *Henry Chauncey v. The Republic of Chile*, No. 3 (Decision No. 4), U. S. and Chilean Claims Commission, Convention of May 24, 1897, Perry's Final Report, pp. 18, 31.

was agreed to refer to a mixed claims commission all claims "owned by citizens of the United States against the Republic of Venezuela." The protocol stipulated that the claims should be decided "upon a basis of absolute equity, without regard to objections of a technical nature or of the provisions of local legislation." This clause no doubt referred among other things to certain provisions in the constitution and laws of Venezuela intended to prevent diplomatic intervention. The umpire of the claims commission, in the case of the Orinoco Steamship Company, rejected certain items based on debts due by Venezuela, on the ground (1) that the claimant had a remedy in the local courts, and (2) that the Venezuelan Government was not notified of the transfer of the claim from the British company to the American company, as a clause in the former company's concession required. The United States, maintaining that the umpire had disregarded the rule of decision laid down in the protocol, asked for a re-examination of his award before an impartial and competent tribunal. By an agreement signed on February 13, 1909, the two Governments submitted the controversy to a tribunal composed of three members of the Permanent Court of Arbitration at The Hague. The agreement stipulated that the tribunal should decide whether the award was (1) void, or (2) to such an extent conclusive as to preclude a re-examination of the case on the merits, and provided that, if the award was not held to be final, the tribunal should then hear and determine the case on the merits. The tribunal, holding that the parties to the agreement of February 13, 1909, had at least implicitly admitted that excess of jurisdiction and essential error were grounds on which the nullity of an arbitral decision might be maintained, reviewed the award, sustaining it in part and overruling it in part. The tribunal allowed the items which the umpire of the claims commission had rejected because the claimant had failed to resort to the Venezuelan courts and to notify the Venezuelan Government of the transfer.³⁴

20. ENHANCEMENT OF BENEFICIAL OWNERSHIP BY WAR

War, as a contest carried on by force, gives to the principle of beneficial ownership increased importance. The belligerents seek to injure each other as much as possible. They search for each other's interests in order to destroy them. To this end they penetrate and disregard corporate and other forms. But, while seeking to injure each other, they must pay due regard to the interests of friends and allies as well to those of neu-

34. Venezuelan Arbitrations of 1903; Ralston, *Report*, 72; *Foreign Relations of the United States*, 1908, pp. 780-786; *idem*, 1911, p. 749.

trals. They may injure non-belligerent interests only so far as this may be necessarily incidental to the exercise of belligerent rights.

As early as 1814, Mr. Justice Story, sitting in the United States Circuit Court, in a case in which the right of a British corporation to maintain a suit, Great Britain and the United States being then at war, was brought into question, declared that the allegation that the corporation was British and that all its members were aliens and British subjects was not conclusive. It did not, he said, follow that they were all alien enemies; some of them might be domiciled in the United States and might, having thus lost the character of enemy aliens, be in a position to enforce the corporate rights.³⁵

The foregoing utterance serves to show how, more than a hundred years ago, it occurred to a great judge that the enemy character of the corporation need not be imputed to the individuals composing it, even in a suit to enforce corporate rights.

The question was judicially discussed in England in 1901 and 1902. August 1, 1899, a company incorporated and registered in the Transvaal, owning and operating gold mines there, and having its head office at Johannesburg, insured a quantity of gold with an English underwriter. The company had an office and committee of management in London, and most of its shareholders were Europeans. October 2, 1899, nine days before war between Great Britain and the Transvaal was formally declared, the gold, while in transit to the frontier, was seized and appropriated by the Transvaal Government. Thus the contract of insurance was made, the seizure took place, and the obligation to pay arose before war was declared. Before the conclusion of peace the company sued the underwriter in England; and, the parties agreeing that the case should be tried and decided as if the war was over, the plea of the suspension of an alien enemy's right to sue therefore was not urged, and the plea that payment of the policy would be an act of trading with the enemy was dropped. The competency of the parties by their agreement thus to assume to regulate the question of alien enemy disabilities did not pass unnoticed by the judges, but the record contains little trace of its discussion. Probably the character of the shareholders, and the existence of the London office and committee of management, account for this fact. The judges at any rate permitted the case to be tried according to the terms of the agreement, and the defense was thus narrowed to two contentions,

35. *Society for the Propagation of the Gospel v. Wheeler* (1814), 2 Gallison, 105, 133.

(1) that the contract was illegal on grounds of "public policy," in that, as it sought to make a British subject liable for losses inflicted on an "alien enemy" by his own government, its performance would in effect constitute "aid" to the enemy, and (2) that, to support this contention, it sufficed that when the transaction took place war was "imminent." In the whole course of the litigation only one of the judges adopted these contentions. The view generally taken was that to hold contracts illegal because war was "imminent" would extend established conceptions of public policy and introduce confusion where certainty was essential. This view rendered the question of the enemy character of the plaintiff practically immaterial. In the House of Lords, however, all the judges mentioned it. Said Lord Macnaghten:

I assume that the corporation . . . was to all intents and purposes in the position of a natural-born subject of the late South African Republic. I do not think it can be entitled to any exceptional favour or to any peculiar indulgence by reason of the fact, if it be a fact, that the bulk of its shareholders were of European nationality. If all its members had been subjects of the British Crown, the corporation itself would have been none the less a foreign corporation and none the less in regard to this country an alien.

Lord Davey: "I think it must be taken that the respondent company was technically an alien, and became, on the breaking out of hostilities . . . , an alien enemy." Lord Brampton: "The majority of its shareholders are subjects of the United Kingdom. . . . The company clearly must be treated as a subject of the (Transvaal) Republic, notwithstanding the nationality of its shareholders." Lord Robertson: "The nationality of its shareholders is immaterial." Lord Lindley took a somewhat different view. He thought that, as the company was incorporated and registered in the Transvaal and carried on business there, though not exclusively, it would be correct to say that it was a "subject" of the Transvaal Government, although almost all of its shareholders were foreigners and non-residents; "but," he added, "when considering questions arising with an alien enemy, it is not the nationality of a person, but his place of business during war that is important." The Lord Chancellor, the Earl of Halsbury, intimated yet another opinion, saying: "It might be the subject of debate whether I am correct in assuming what I assume for the purposes of my judgment; but for the sake of clearness I do assume that the plaintiff company was an alien, a subject of the Transvaal Government."

This statement of the Lord Chancellor not only raised a doubt as to the soundness of the view that the company was

properly to be considered as "an alien, a subject of the Transvaal Government," but it also indicates how readily that view, which had become immaterial, could be assumed for the purpose of bringing into clearer relief the real ground of the decision. In the Court of Appeal, however, where a phase of the question of public policy, to which the enemy or non-enemy character of the company was material, was discussed, Sir A. L. Smith, Master of the Rolls, said:

It is true that the plaintiff company is registered as a company in South Africa; but it is equally true that the beneficial ownership in the gold insured did not belong to persons subjects of the Government of the South African Republic and resident therein; and what is more important still to my mind is that neither the persons to whom the insured gold really belonged nor the company as a legal entity were in truth and in fact enemies of this country when the loss incurred; and, indeed, in my opinion, in truth and in fact, neither these persons nor the company have ever at any time been *de facto* enemies of this country. . . . Can any wilder suggestion be well made than that the repayment of this loss of their gold to the plaintiffs is in truth and in fact against the interests of this country? It certainly appears to me that this defence for not paying the loss incurred because of its being against public policy is, as a matter of fact, absurd, and I am not surprised that my brother Mathew has held that the defence was unfounded. . . . In my judgment, "enemy," as regards the application of this public policy, means a real *de facto* enemy, and not a mere possible technical enemy, like the company in this case. That the above indemnity of a real enemy *de facto* of this country would be against the interests of this country when at war, and therefore against public policy I do not doubt. But where upon the facts of the case can it be found that the policy of insurance sued on covered a loss sustained by a real enemy of this country? As a matter of truth, the suggested loss to a real enemy of this country is all fiction.³⁶

It remained for a great war, involving to the utmost all material resources, to bring about the effective judicial subordination of formal tests, which suited the unalarmed convenience of a state of peace, to the test of beneficial interest.

After the outbreak of war between England and Germany, a company, incorporated in England by a German company to sell the latter's products, brought suit to recover a trade debt. All the directors of the English company were Germans residing in Germany, and all the shares were owned in Germany, except one that was held by the secretary, a naturalized British subject of German birth, who lived in England, and who

36. *Driefontein Consolidated Gold Mines, Ltd., v. Janson*, L. R. (1901), 2 K. B., 419, 427-428; *Janson v. Driefontein Consolidated Gold Mines, Ltd.* (1902), A. C., 497.

brought the suit in the company's name. In answer to a summons for judgment, it was alleged (1) that the company, although incorporated and engaged in business in England, was in reality an alien enemy and therefore debarred from suing in an English court, and (2) that the suit was instituted by the secretary without authority. These objections were overruled; final judgment was entered; and this judgment was affirmed by the Court of Appeal, in which Lord Reading, Chief Justice; Lord Cozens-Hardy, Master of the Rolls; and the Lords Justices Kennedy, Phillimore and Pickford, with the dissent of Lord Justice Buckley, upholding the right of the company, as an English corporate entity, to sue. The House of Lords reversed the judgment, the Earl of Halsbury, Viscount Mersey, and Lords Atkinson, Kinnear, Parker of Waddington, Parmoor, Shaw of Dunfermline, and Sumner being present. Some of the judges thought that the suit was brought without authority, but there was general concurrence in the view that there were irregularities in the proceedings, and a judgment was entered dismissing the action and directing all orders in it to be discharged. But, as the question of enemy character had been so elaborately argued and was of such general importance, all the judges expressed opinions upon it, the most elaborate being that of Lord Parker, in which Viscount Mersey and Lords Kinnear and Sumner expressed concurrence.

Lord Parker thought that, in transferring to artificial persons the restrictions to which natural persons were subject in war, the analogy was to be found in "control, an idea which," he said, "if not very familiar in law, is of capital importance and is very well understood in commerce and finance." A British corporation, as a "legal entity," could, it was true, be "neither friend nor enemy"; and so long as it carried on business in British jurisdiction through its authorized agents, and resided there or in a friendly country, it was "*prima facie* to be regarded as a friend"; but it might "assume an enemy character if its agents or the persons in *de facto* control of its affairs, whether authorized or not," were "resident in an enemy country or, wherever resident," were "adhering to the enemy or taking instructions from or acting under the control of enemies." The "character of individual shareholders" could not "of itself affect the character of the company." This was so in times of peace, and it would be anomalous if it were not so in time of war, when shareholders' rights and privileges were "in abeyance"; but the "enemy character of individual shareholders and their conduct" might be "very material on the question whether the company's agents, or the persons in

de facto control of its affairs," were "in fact adhering to, taking instructions from, or acting under the control of enemies." This materiality would "vary with the number of shareholders who are enemies and the value of their holdings"; and if it were shown that, "after eliminating the enemy shareholders the number of shareholders remaining is insufficient for the purpose of holding meetings of the company or appointing directors or other officers," this fact, said Lord Parker, might "well raise a presumption in this respect." Thus, in the case before the court, the circumstances were "such as to require close investigation." So, a British company carrying on business in a neutral country through authorized agents, and "resident" either there or in the United Kingdom, was "*prima facie* to be regarded as a friend," but might, "through its agents or persons in *de facto* control of its affairs, assume an enemy character." On the other hand, a British corporation carrying on business in an enemy country was to be regarded as an enemy. His lordship, in the course of his opinion, also discussed the *Driefontein* case³⁷ saying:

What really is significant in that case is this: few, if any, of the shareholders in the company were in fact subjects of the South African Republic. The vast majority were subjects of various European States. The company's argument was, "How can it be contrary to British public policy that individual Frenchmen and Germans or Italians should get the practical benefit of this policy?" In the Court of Appeal Sir A. L. Smith, M. R., expressly accepted this argument. To him at least there was no impenetrable screen, interposed by registration, between the company and its shareholders. Beyond this I think for present purposes the case does not go.

Lord Atkinson thought the vital question was that of the "residence" of the company, so far as "a fictitious legal entity could have one," as determined by "the real business centre from which the governing and directing minds of the company operated, regulating and controlling its important affairs," and that the fact of incorporation in England was not conclusive.

Lord Shaw saw no advantage in characterizing British registered companies "as either alien enemies or companies with an alien character"; he thought that the statutes attached enemy character only to companies incorporated in an enemy country.

Lord Parmoor, on the question of the company's "nationality," agreed with Lord Shaw.

Lord Halsbury, developing the view of which he had fifteen

37. *Supra*, p. 280.

years before given an intimation in the *Driefontein* case,³⁸ declared that the object sought to be attained was "to enable thousands of pounds to be paid to the King's enemies." He commented on the fact that the Germans concerned were "entitled to receive in the shape of dividends the profits of the concern in proportion to their shares in it." He affirmed that "this machinery, while perfectly lawful in peace time," became "absolutely unlawful" when the German traders were at war with Great Britain; and, after remarking that the German shareholders could neither meet in England nor authorize an agent to do so, that they could not trade with British subjects nor the latter with them, and that they could not comply with the provisions for the government of the company, he said:

It becomes material to consider what is this thing which is described as a "corporation." It is, in fact, a partnership in all that constitutes a partnership except the names, and in some respects the position of those whom I shall call the managing partners." His lordship likened the argument in favor of the English corporate entity to an attempt to excuse the giving of gold to the enemy "by alleging that the bag containing it was of English manufacture." He added: "I observe the Lord Chief Justice says that the company is a live thing. If it were, it would be capable of loyalty and disloyalty. But it is not; . . . Neither is the bag in my illustration "a live thing."³⁹

It will be observed that the foregoing cases relate solely to privileges of intercourse, the exercise of which is prohibited if it involves what is generically known as "trading with the enemy." In order to ascertain whether this prohibition had arisen, the courts looked beyond the corporate entity. The question of captured property was not involved. That question came before the prize courts, which, discarding the test of corporate entity, proceeded upon the ground of beneficial ownership.

It was so ruled in July, 1916, in the case of a steamer, registered as a British ship, and used before the war as a tender at Southampton for the vessels of the Hamburg-American line. The legal title to the steamer was in a British company; but the Hamburg-American line through its nominees owned the company's entire share capital and received all the profits. It furthermore appeared that the directors of the company, who paid nothing for their qualification shares, were appointed by the Hamburg-American line, which took from them an agreement to conform to its instructions; but it also appeared that,

38. *Supra*, p. 280.

39. *Daimler Company, Ltd. v. Continental Tyre & Rubber Company, Ltd.* (1916), 2 A. C., 307.

after the war broke out, they chartered the steamer to the British Admiralty. Subsequently, the steamer was seized as prize on the ground that she was enemy property or the property of a company controlled by the enemy. It was held that the Prize Court was bound to look beyond the legal, nominal ownership to the real ownership, and that, the real owner being the Hamburg-American line, the ship was enemy property, and must be treated as any other enemy merchant ship actually in port at the outbreak of hostilities.⁴⁰

The same ground was maintained in December, 1917, in the case of a steamship legally owned by the Hamborn Shipping Company, a Dutch corporation, and flying the Dutch flag. The steamer was captured by the British on October 27, 1917, and was condemned as enemy property, on the ground that the real ownership was German, Sir Samuel Evans, in his sentence as President of the Prize Court, declaring:

It is a settled rule of prize law, based on the principles on which prize courts act, that they will *penetrate through and beyond forms and technicalities to the facts and realities*. This rule, when applied to questions of the ownership of vessels, means that the Court is *not bound to determine the neutral or enemy character of a vessel according to the flag she is flying, or may be entitled to fly*, at the time of capture. The owners are bound by the flag which they have chosen to adopt, but captors as against them are not so bound.⁴¹

With reference to the statement of the President of the Prize Court that, in the case of a captured ship, the "owners are bound by the flag which they have chosen to adopt," it suffices to remark (1) that prize courts are in the habit of making all possible intendments in favor of the captor, and (2) that a ship which goes to sea, at any rate after war has begun, under the protection of the enemy flag, has always been treated as having thereby subjected itself to capture and condemnation.⁴²

The materiality of the idea of "control," as discussed by Lord Parker in the *Daimler* case and by Sir Samuel Evans in the case of the *Studno*, depends both upon the nature of the case and the circumstances. While, in a case involving "trading with the enemy," such as that of *Daimler*, the idea is theoretically relevant, its materiality may be, in an actual sense, non-existent; and the question, raised by the Earl of Halsbury, of the enemy or non-enemy character of the persons for whom the profits are to be earned, may be far more substantial. So,

40. The *Studno* (July 26, 28, 1916), 2 Prize Cases, 272; Judgment by Sir Samuel Evans, President of the Court.

41. The *Hamborn* (December 12, 1917), 2 Prize Cases.

42. The *Vrow Elizabeth* (1803), 5 C. Rob., 2, 4-5.

where captured property is sought to be condemned on the charge that it was employed in a hostile enterprise, its control at the time of capture may be a material consideration. Manifestly this was not so in the case of the *Studno*, where the ship had actually been chartered by the "controlled" British directors of the "controlled" British Company in uncontrolled British jurisdiction to the British Government, which, in the exercise of its uncontrolled possession, "seized" the ship and in a legal sense turned it over to the Prize Court. The idea of enemy "control" was in these circumstances a mere abstraction. On the other hand, to the actual ground of the sentence—enemy ownership—it was irrelevant.

21. INDEMNITY DEMANDS: IMMUNITY OF ALLIED AND ASSOCIATED INTERESTS

(1) Law, and Governmental Practice

Except in prize cases, dealing with captured property, nowhere has the discussion of questions of enemy character disclosed any trace of a claim of confiscation. Nowhere has it been suggested that, if a corporation was shown to have an enemy character, the property held in its name, though within the control or jurisdiction of the court, might, by reason of the enemy character of the company holding the legal title, be confiscated. Such a pretension would in fact be contrary to solemn adjudications.

In an action under the Legal Proceedings against Enemies Act, 1915, the question arose as to whether a German partner in an English company, engaged in a manufacturing business, in England, was entitled (1) to a share of the profits made since the dissolution of the partnership by war, or (2) to interest on his share in the partnership assets, or (3) only to the value of his share in the partnership as of August 4, 1914, the date of the beginning of the war. The House of Lords, January 25, 1918, unanimously held that the German partner was entitled to a share of the profits, so far as attributable to the use of his share of the capital. The Lord Chancellor, Lord Finlay, said: "It is not the law of this country that the property of enemy subjects is confiscated. Until the restoration of peace the enemy can, of course, make no claims to have it delivered up to him, but when peace is restored he is considered to be entitled to his property with any fruits it may have borne in the meantime." Viscount Haldane: "The law of this country does not in general confiscate the property of an enemy. He cannot claim to receive it during war, but his right to his property is not extinguished; it is merely suspended." Lord

Dunedin concurred. So, also, Lord Atkinson, who declared that the opposite view was one "which not even the most rabid patriotism can justify." Lord Parmoor remarked that the right of confiscation of enemy property on land in favor of the Crown had "long since been disused."⁴³

If Lord Atkinson was correct in declaring that "even the most rabid patriotism" could not justify the assertion of a lawful right to confiscate private property which, like that before the court, was owned, both legally and beneficially, by an enemy, so, it is believed, not even could a propagandist, in the full tide of chartered superiority to tests of reason or of sobriety, be found to assert that property beneficially owned by an ally and friend, and lying uncaptured in an enemy country, may lawfully be taken on a claim of confiscation, though draped as "indemnity," because the legal title to the property is in an enemy corporation.

Such a pretension would be inconsistent with the practice of all the belligerents, none of whom claimed a general right of confiscation even as against another, much less as against friends and neutrals. While their legislation provided for the sequestration or taking into custody of enemy companies, and of enemy interests, in the form of shares of stock and of dividends on such shares, in domestic, friendly or neutral companies, in no instance was it intimated that the enemy character of the company infected the friendly or neutral interest so as to give it an enemy character. The contrary principle was proclaimed and applied. It will suffice to trace its operation in France and Germany.

In Germany, authority was given by an ordinance of September 4, 1914, to place under surveillance all enterprises or branches of enterprises directed or controlled by an enemy country, or whose pecuniary profits were intended to be sent in whole or in part to such a country. By a general ordinance of November 26, 1914, concerning the compulsory administration of alien-owned property, the State administrative authorities, with the consent of the Imperial authorities, were authorized, by way of reprisal, (1) to place under administration enterprises whose capital was wholly or in major part (*überwiegend*) attributed (*zusteht*) to French citizens, (2) to liquidate such enterprises, including companies (*Gesellschaften*) having their domicile (*Sitz*) in Germany. The Chancellor was authorized by way of reprisal to extend this decree to the nationals of other enemy states.⁴⁴ An amendment of Jan-

43. Hugh Stevenson & Sons, Ltd., Appellants; and Aktiengesellschaft für Cartonnagen-Industrie, Respondents (1918), A. C., 239.

44. *Kriegsbuch*, I, 880-881.

uary 5, 1915, provided that changes in capital-participation effected after November 26, 1914, should not be respected, the purpose of the amendment being to cover cases in which shares in domestic enterprises (*Kapitalanteile*) had been transferred by their alien enemy owners to Germans or neutrals in order to evade the provisions as to sequestration, compulsory administration or liquidation.⁴⁵ By a proclamation of October 10, 1915, the directors or managers of domestic enterprises in which alien enemies had a part were required to report the name, residence and nationality of such participating alien enemies as well as the kind and amount (*Umfang*) of their participation, including the amount of the shares of stock, if any, held by them.⁴⁶ Thus only enemy interests were taken over.

From first to last the French authorities declared the measure of sequestration to be *conservatory*.⁴⁷

On the strength of this principle, the Civil Tribunal of the Seine refused to authorize the sequestrator of a German company to pay French creditors in full, until it appeared that the assets were sufficient to assure the eventual payment of the debts due to German creditors.⁴⁸

Under the decree of September 27, 1914, authorizing the sequestration of enemy interests, the Civil Tribunal of Havre ordered the taking over of a French company constituted solely with German capital and exclusively administered by Germans.⁴⁹ Precautions were taken against false French, allied or neutral disguises;⁵⁰ but, where there was a real admixture of French, allied or neutral with German interests, only the latter were sequestered, and it was thought advisable to entrust the sequestration to the French, allied or neutral partners.⁵¹

Perplexities inevitably arose in determining the character of companies. In the case of a simple partnership there was little difficulty; the names being known, the sequestration would be partial or total, according to the enemy or non-enemy character of the partners. In the case of joint stock companies, all the facts were examined, in order to determine whether the enemy interests were preponderant or in a mi-

45. *Idem*, pp. 883, 886.

46. *Idem*, II, 426. *R. G. Blatt*, p. 653.

47. Circulars of the Keeper of the Seals, M. Briand, January 6, 1915; M. Viviani, February 29, 1916; M. Momer, March 21, 1916: *Reulos, Manuel des Séquestres*, I, 124, 185, 374.

48. *Reulos*, I, 370-371, 372, 343-344.

49. *Idem*, pp. 41-43.

50. *Idem*, p. 44.

51. *Idem*, pp. 51, 339.

nority; if preponderant, the sequestration was total; if in a minority, the sequestration was limited to the enemy interests. In the case of incorporated stock companies (*sociétés anonymes par actions*)—anonymity constituting the essential element—it was necessary to seek the *origin of the capital*, and to determine the nationality of those who held it; to examine the nationality of the trustees; and to take into account a multitude of elements of fact which would in their entirety play an important rôle in determining the true character of the company, such as the place where the statutes were drawn up, the home office, the situation of the principal establishments and of the branches, the place where the general meetings were held, the subscription of the initial capital, the nationality of the principal shareholders, the agreements concluded between the company and other firms and foreign enterprises, and any modifications made in the statutes.⁵² The Court of Cassation quashed an appeal from a decision of the Court of Lyons, refusing to raise the sequestration of a company called *Société anonyme franco-suisse*, incorporated in France and having there its home office, but belonging almost wholly to subscribers or security-holders of German nationality, and the director and trustees being Germans who left France on the outbreak of hostilities. The company was treated as a mere cover for a German commercial enterprise functioning in France.⁵³ It was found to be impossible, however, to establish a certain criterion in a matter so variable and so complex, since none of the elements above mentioned could be so isolated from the rest as to furnish a certain basis of judgment. Thus, the fact that out of twelve trustees seven were German, was held not to justify the total sequestration of a corporation, where it appeared that it was founded in Belgium, where it had its home office and its economic and industrial life; that it never had a branch in Germany; that the five-non-German trustees, among whom was the managing director, were Belgians, who had never sought to serve German interests. The sequestration was confined solely to the German interests.⁵⁴ It is true that in one case, in 1915, the Court of Appeal of Rouen attributed decisive importance, under the decree of September 27, 1914, to the fact that a company was incorporated in France and had there its home office, and ordered only the sequestration of the enemy interests in it although the capital was three-fourths subscribed by German

52. *Idem*, p. 253.

53. *Idem*, p. 254.

54. *Affaire Société "la Foraky,"* decided by the President of the Tribunal of the Seine, December 28, 1915. Reulos, I, 254.

and Austrian shareholders, two of the latter being statutory trustees, in association with a Danish subject and a mobilized Frenchman. But this ruling was not followed by the majority of the Tribunals, and notably was not followed by the Tribunal of the Seine, which acted on the principle of preponderant interest; and it was disposed of by the circular of the Minister of Justice, M. Viviani, of February 29, 1916, which said "it (the corporation) must be assimilated to subjects of enemy nationality, where notoriously its direction or its assets (*ses capitaux*) are, in whole or in greater part, in the hands of enemy subjects."⁵⁵

It thus appears that in France, in determining whether a company should be placed under sequestration, great stress was laid upon the ownership of a preponderant interest in the assets by persons of enemy nationality. But the question of nationality was also considered to be of capital importance in the case of a firm or company of *allied* or *neutral* nationality. Unless it was shown that the enterprise was a cover for an enemy company functioning in France, the fact that there was a certain number of enemy shareholders was held not to justify sequestration, except of the profits accruing to such shareholders.⁵⁶ In a circular of January 6, 1915, M. Briand declared that not only did the sequestration of enemy industrial or commercial establishments "leave intact the rights of creditors of allied or neutral countries as well as those of French creditors," but that the operation of such establishments might be authorized "in order to safeguard the interests of French creditors, to whom must be assimilated the creditors of allied or neutral nations." In "whatever concerns the safeguarding of their interests," said the circular, "creditors belonging to allied or neutral nations have the same rights as French creditors"; and if it was essential to the preservation of those interests, the continued exploitation of such establishments must be authorized.⁵⁷

It thus appears that, in France, it was held (1) that sequestration, although designed to reach and to control only enemy interests, was a *conservatory* measure; (2) that it did not signify even as regards such interests a *confiscatory* purpose; (3) that, in determining whether a company should be confiscated, great weight was given to preponderance of interest in the assets; that it was not designed to injure allied or neutral interests, which were declared to be on the same footing as French interests and were sedulously protected;

55. *Idem*, pp. 185, 255.

56. *Idem*, p. 256.

57. *Idem*, pp. 124, 125.

(4) that it consequently never was imagined that the ascertained enemy character of a corporation infected and gave an enemy complexion to French, to allied or to neutral interests.

No matter to what country we turn, the record, judicial and administrative, in its entirety and in all its parts, conclusively demonstrates that the interests, whether individual or corporate, of allies and friends, are not subject to appropriation.

(2) Treaty of Versailles

Since the attempt to appropriate the property interests, whether legal or equitable, of allies and friends would constitute a flagrant violation of law and of governmental practice, any excuse for it must, in the present instance, of necessity be sought in the Treaty of Versailles. But, at this point, it is important to inquire in what way, so far as concerns the present question, the failure of the United States to ratify the treaty would affect American interests.

On the Treaty of Versailles, confessedly, alone rests the right of the Allied and Associated Powers now to demand the delivery of any specified property in Germany as war indemnity. In this respect it gives to those Powers a right as against Germany, which only ratifying Powers can claim; and imposes on Germany a corresponding obligation, the performance of which only ratifying Powers can exact. But, the failure of some Power to ratify the treaty cannot enlarge the right, which continues to exist only as the treaty created it. The specified limitations constitute an integral part of its definition, and beyond them the right of appropriation ceases. The observance of those limitations may be demanded by anyone whose interests are affected. It may be demanded by ratifying Powers, including Germany. It may be demanded even by non-signatory Powers. This is indeed admitted by the treaty, which expressly recognizes the interests of neutrals. The question whether non-ratifying and non-signatory Powers may claim additional immunities may be reserved. It may suffice now to say that the treaty imposes no limitation that private law and public law, including international law, does not equally prescribe.

An examination of the stipulations of the Treaty of Versailles justifies the affirmation that the attempt to appropriate, as war indemnity, the property interests, whether legal or beneficial, of allies and friends would constitute a palpable violation of its letter as well as of its spirit.

It would violate the injunction, laid upon the Reparation

Commission, to be "guided by justice, equity and good faith." (Art. 243, Annex II, par. 11.)

It would no less violate the rule requiring the Reparation Commission, in *fixing* or *accepting* payment in "specified properties, to show due regard for "any legal or equitable interests of the Allied and Associated Powers or of neutral powers or of their nationals therein." ⁵⁸ This rule, which merely recognizes the fact that the ownership, legal or beneficial, of property in a country which happens to become hostile, never has been and is not now regarded as a crime to be visited with the penalty of confiscation, would of necessity be violated by the appropriation of ships which are to the extent of at least eighty-five per cent equitably owned by an American "national," the Standard Oil Company. As has heretofore been indicated, ⁵⁹ the rule could not be satisfied by a mere pecuniary allowance, since the ships constitute an essential part of the Company's equipment in the conduct of its business. Nor would such a payment to the Company show due regard for the interest of the United States, an Associated Power, in protecting and preserving the commerce and industry of its nationals, and the agencies and instrumentalities which they own and employ.

Equitable rights are further recognized and protected by Part IX, Financial Clauses of the treaty, which contains the following provision:

Article 253. Nothing in the foregoing provisions shall prejudice in any manner charges or mortgages lawfully effected in favor of the Allied or Associated Powers or their nationals, respectively, before the date at which a state of war existed between Germany and the Allied or Associated Power concerned, by the German Empire or its constituent states, or by German nationals, on assets in their ownership at that date.

If "mortgages" or "charges" on assets owned by German nationals prior to the war are recognized as remaining in full force, *a fortiori* the rights of the beneficial owner, who is entitled, not to the mere return of a sum of money, but to the use and profits of the property itself, must be respected. Article 253 further serves to demonstrate that the property which is to be taken as indemnity for acts of Germany is not to be regarded as captured property, since condemnation, under the law of the prize courts, does away with liens and charges. ⁶⁰

This distinction is preserved in other parts of the treaty. Thus, by Article 260, which requires Germany to expropriate

58. *Supra*, p. 239.

59. *Supra*, p. 226.

60. *The Hampton*, 5 Wall., 372; *the Battle*, 6 *idem*, 498.

and turn over to the Reparation Commission "any rights and interests of German nationals in any public utility undertaking or in any concession operating in Russia, China, Turkey, Austria, Hungary and Bulgaria," it is provided that Germany "shall be responsible for indemnifying her nationals so dispossessed." It will be observed that the only rights and interests to be taken over are those of German nationals, and that, correspondingly, the indemnity which Germany is to make is only that to "her nationals so dispossessed." It was not conceived by the Contracting Parties to be possible that Allied or Associated property in Germany, whether legally or beneficially owned, should be taken for purposes of indemnity, no corresponding provision being made for indemnifying the nationals of Allied or Associated Powers in that event.

Moreover, it is a notorious fact that the Treaty of Versailles, in providing for the protection of the "property, rights and interests" of nationals of Allied and Associated Powers in Germany, against war measures of the German Government, has adopted as the basis of such protection the *principle of interest*. Thus, Article 297 (a), in providing that the "property, rights and interests" of "nationals" of the Allied and Associated Powers, which have been subjected in Germany to "exceptional war measures and measures of transfer," shall be "*restored to their owners*," defines the obligation to such nationals as "including companies and associations in which they are *interested*." Likewise, Article 297 (e), in stipulating that Germany shall compensate the nationals of Allied and Associated Powers for damages to their property, rights or interests by exceptional war measures or measures of transfer, speaks of such nationals as "including any company or association in which they are *interested*"; and Article 297 (f) requires that, if such national so desires, the claim for compensation "*shall be satisfied by the restitution of the said property if it still exists in specie*." So, throughout the treaty, wherever the object is the protection of the "property, rights and interests" of the nationals of Allied or Associated Powers in Germany, such nationals are defined as "including companies and associations in which they are *interested*." (Art. 298, Annex I, pars. 4, 6, 7, 12, 13.)

It thus appears that, where the "properties, rights and interests" of "nationals of Allied or Associated Powers, including companies and associations in which they are *interested*" were seized by Germany, the treaty explicitly imposes on Germany the obligation to restore them. Is it credible that the Allied and Associated Powers, when making this *conservatory* rule the measure of their rights as against Germany, intended

to discard it, or to adopt a lower standard, as between themselves? We must so believe, if, on pretense of exacting indemnity from Germany for her unlawful acts, they have, by other clauses of the treaty, undertaken to despoil one another's nationals, in whole or in part, of properties, rights or interests which Germany, if she had seized them, would, under the conservatory rule, have been required to restore to their respective owners. Such an interpretation of the treaty is inadmissible. For more than a century, statesmen, publicists, and courts have been preaching the exemption of enemy private property on land from confiscation. They have not advocated like consideration for the property of allies and friends, since it was not supposed to be in similar jeopardy.

III. SUMMARY OF FACTS AND LAW

1. The Standard Oil Company (New Jersey) is an American-owned American Company, conducting a worldwide business in the supply of petroleum, and the manufacture, sale and distribution of petroleum products.

2. The business abroad is largely conducted through subsidiary companies, locally incorporated. These companies, whose securities the Standard Oil Company owns wholly or in major part, constitute, with their property and equipment, branches or agencies of the parent Company; and it is well understood that an injury done to them is an injury not only to the Company but also to American commerce and industry.

3. Among the Company's foreign subsidiaries, one of the most important is the Deutsch Amerikanische Petroleum Gesellschaft, popularly called the D. A. P. G., the Standard's German branch. Prior to August 1, 1914, petroleum and petroleum products constituted one of the four largest items of export from the United States to Germany. This commerce was chiefly built up in the course of twenty-five years by the Standard Oil Company operating through the D. A. P. G. The Standard's financial interests in Germany, through the D. A. P. G. and sub-companies, including good will, was conservatively valued in April, 1914, at \$48,500,000. Of this the plant and equipment, including ships, represented \$23,500,000. The Standard's cash investment, exclusive of earnings turned back into the property and business, was more than \$22,400,000.

4. The total capitalization of the D. A. P. G. is M. 60,000,000, represented by shares, share warrants and debenture bonds as follows: Shares, M. 9,000,000; Share Warrants, M. 21,000,000; Debentures, M. 30,000,000. All these securities, except the small amounts of M. 26,000 of Share Warrants, and M. 6,500

of Debentures, belonged to the Standard Oil Company. All these securities, including the so-called Debentures, represent, in spite of their different names, a substantially identical interest in the property and business of the D. A. P. G., all being entitled to the same rate of return, and alike wholly dependent for profit and value to their owner on the retention of the D. A. P. G. plant, equipment and business.

5. Early in February, 1917, when war was in prospect, the Shares were transferred to certain German subjects connected with the D. A. P. G. management, who pledged as collateral a quantity of American securities belonging to them in the United States. This was done to prevent the German Government from placing under sequestration the entire property of the D. A. P. G., including ships, as the property of a company both American-owned and American-controlled; for, although the Shares represented less than a sixth of the capital investment, they carried voting power, while the Share Warrants and Debentures did not. The Alien Property Custodian, however, declined to recognize the sale as valid, and took the pledged securities, holding that the Shares still belonged to the Standard Oil Company.

6. Among the properties carried in the name of the D. A. P. G. was a fleet of tank steamers, built with funds, which, so far as they were not earned by the Standard through the D. A. P. G., were directly advanced to the latter. For these advances, which, prior to August 1, 1914, amounted to more than \$7,000,000, the Standard received the so-called Debentures. The tankers were used by the Standard both in the trade with Germany and elsewhere.

7. The Standard's investment, through the D. A. P. G., was universally recognized as an American property interest. The United States repeatedly interposed diplomatically against acts or threatened acts of the German Government injurious to the D. A. P. G., and this interposition was accepted by the German Government, notably in the case of the threatened monopoly some years ago.

8. Soon after the outbreak of the war in Europe, a D. A. P. G. tanker, called the "*Leda*," was captured by a British cruiser, and was taken into Bermuda and condemned as a German registered ship flying the German flag; but the British Government, on the strength of the equitable, or beneficial, American ownership, restored her to the Standard, which put her under the American flag. Subsequently, on the same ground, the British and French Governments both concurred in the transfer to the Standard and to the American flag, of all the D. A. P. G. tankers not in German ports. The tankers

in German ports remained there, the Allies having declared a blockade of Germany.

9. The action of Great Britain and her Ally in these transactions was not exceptional, but was in accordance with their settled policy, administrative and judicial, to treat, as enemy property, the property of German-owned British, French or neutral companies, so as to be able not only to appropriate all such property coming into their possession, but also to prevent the formation in neutral countries of companies, with German capital, to send ships to sea in the German interest under neutral flags and neutral protection. The object thus gained was of incalculable advantage.

10. In March 1919, the Supreme Economic Council, through its Shipping Section, at Brussels, exempted the tankers in German ports from allocation.

11. The peace treaty, in the Reparation Clauses, Annex II, paragraph 20, expressly provides that the Reparation Commission "in *fixing* or *accepting* payment in specified property or rights, *shall have due regard for any legal or equitable interests of the Allied and Associated Powers or of neutral powers or of their nationals therein.*"

12. Nevertheless, the president of the Allied Naval Armistice Commission, in London, on August 15, 1919, assumed to cancel the Brussels exemption and to order the tankers to the Firth of Forth for "allocation." This was done in spite of the fact that the exemption was made by the Supreme Economic Council itself, which, as its proceedings affected the interests of all the Powers, had always acted on the principle of unanimity, the consultation and assent of all their representatives thus being requisite.

13. Prior to the attempt irregularly to allocate the D. A. P. G. tankers, it had not, so far as the record shows, occurred to any one to propose that property of any kind in Germany, whether afloat or on shore, which belonged, equitably or beneficially (i. e., actually) to an Allied or Associated Power or its citizens, should be appropriated or confiscated to indemnify another such Power or its citizens for losses inflicted by Germany. Allies and friends are not supposed, while fighting a common enemy, to treat one another's property, and much less the private property of their citizens, as enemy property. In other words, they are not supposed at the same time to fight for and prey upon each other.

14. The subordinate authorities who were concerned in the attempt to annul the action of the Supreme Economic Council and "allocate" the D. A. P. G. tankers would seem to have been fully conscious of these things. The action of the president of

the Allied Naval Armistice Commission at London, on August 15, 1919, appears to have been personal and arbitrary, and to have been taken without the knowledge of the American and French members of that body; it was at any rate taken without the knowledge of the American representative.

15. Nothing was known at Washington of what was taking place till September 11th, when Admiral McCully, the representative of the United States on the Allied Naval Armistice Commission, acting under instructions of the Navy Department, which were telegraphed to him on September 4th, cabled the result of his inquiries.

16. When acquainted with the facts, the Department of State promptly telegraphed instructions to the American Mission at Paris, calling attention to the Brussels Agreement of March last, and stating that the Department was not informed on what authority the president of the Naval Armistice Commission had assumed to cancel that agreement, or on what authority the Allied Maritime Transport Executive refused to authorize commercial voyages of ships not allocated, or assumed to make further allocations. The Mission was further instructed to continue to press for the immediate dispatch of the steamers to the United States for the transportation of petroleum supplies to the German market, where such supplies are urgently needed.

17. On September 17th, the Allied Maritime Transport Council, at London, claiming jurisdiction by virtue of the illegal order of August 15th, by which the president of the Naval Armistice Commission assumed to cancel the Brussels exemption, undertook to allocate the tankers.

18. In consequence of the protest of the United States member of the Council, this attempt was abandoned; but, on a motion proceeding from a quarter not here known, a meeting was called, at Brussels, for September 20th, of the Shipping Section, on which the United States was not represented, to cancel the exemption and allocate the ships.

19. The American Mission at Paris, on hearing of this move, telegraphed the American Legation at Brussels to notify the Section that no such action should be taken without referring the question to the Supreme Council at Paris; but the Section, whether before or after this notice was given is not known, recommended that the exemption be cancelled, telegraphed orders to Hamburg to send the tankers to the Firth of Forth, and provisionally allocated the ships as follows: France, 23,000 tons; Great Britain, 12,800; Belgium, 12,000; Italy, 10,000; United States, 3,200. The extreme liberality of the allotment to the United States of a twentieth part of this American-

owned tonnage, built with American private funds, can hardly fail to be recognized. Evidently, the main object was that the American owners should get practically none of it.

20. The American Mission continuing to protest, the attempted allocation was stopped; but the authorities at Hamburg, under Allied compulsion later sent the tankers to the Firth of Forth, where they have remained in the custody of the British Government.

21. Meanwhile, it was intimated from Paris that the dispatch of the tankers to the United States would be facilitated if an assurance were given that their present use in commercial voyages "will not be allowed by the United States authorities to prejudice their final allocation." This meant, in effect, that the United States should consent that the attempt which had been made to appropriate American-owned ships and distribute them among the Allied Powers, as indemnity for acts of Germany, should eventually be consummated. This proposition was necessarily declined.

22. Various other manœuvres were afterwards tried, among which was an intimation that a solution would be facilitated, if the Standard Oil Company would extend special credits to France, where, in fact, not only was a measure pending to create a state monopoly in petroleum, but where the importance to France of obtaining the tankers, in order to fortify that measure, had been debated in the parliament.

23. It has been suggested that the ships must be detained, pending the action of the Reparation Commission. This excuse is unfounded. The Reparation Commission is only an executive agency of the Powers; and all along, both before and since the signature of the Treaty of Versailles, the Powers have been distributing German shipping among themselves. It is notorious that, in making these "provisional" allocations, they have adopted as their guide the principle that the ships should be assigned to the Powers that were permanently to retain them. The Allied Powers have at all times been competent to recognize the rights of the Standard Oil Company, and to turn the ships over to it. Instead of so doing, they at first forbade the German authorities to permit the tankers to leave Hamburg, and later took them into their own custody. But the Standard Oil Company refused to relinquish its right to the ships for the sake of temporarily using them, even at a moment when tankage was scarce. Their detention has, however, caused the Company great loss and inconvenience.

24. The right of the Standard Oil Company to the ships, as their actual, beneficial owner, is sustained by established principles of law, private and public, and by governmental prac-

tice, national and international. The attempt that has been made to appropriate the ships involves, in its last analysis, nothing less than a claim that American-owned property may, because the nominal title is in a German corporation, be seized and taken over by the Allies as indemnity for acts of Germany. Such a claim is at variance with established principles and is altogether inadmissible.¹

New York, N. Y., March 25, 1920.

STANDARD OIL CO. (NEW JERSEY).

JOHN B. MOORE,
C. O. SWAIN,
GUY WELLMAN,
of Counsel.

1. *Supra*, pp. 226, 285-293.

BOOK REVIEW

LES ÉTATS-UNIS D'AMÉRIQUE ET LE CONFLIT EUROPÉEN 4 AOÛT 1914-6 AVRIL 1917. Par ACHILLE VIALATE, *Professeur à l'École des Sciences politiques*. Paris, Félix Alcan, 1919. Pp. x, 343.

Probably no Frenchman, if we except Mr. Jusserand, the present French ambassador at Washington, is capable of speaking with greater definiteness and precision regarding affairs in the United States than is the author of the present volume. His essays on American diplomatic history, which appeared in 1905, were followed in 1908 by a work on American industry, its evolution, organization and expansion; and both publications were characterized by an intimate acquaintance with printed materials, supplemented by personal inquiries.

The volume now before us not only narrates what took place in the United States during the period designated in the title, but also endeavors to explain it in the light of past as well as of current political conditions and policy. In this way the reader gains the benefit of a survey of the foreign policies of the United States by a competent critic, whose detached position enables him to give to events interpretations which might not occur to one with a nearer and less commanding view of the field of action. For the same reasons, the work is not of that purely evanescent type which predominates among the books and pamphlets so far published in relation to the war.

In matters of judgment an entire agreement between an author and a reviewer on all points cannot be expected. M. Viallate, for instance, expresses the opinion that, in spite of unfavorable impressions that earlier prevailed, the Kaiser, partly as the result of Prince Henry's visit, but more especially as the result of the cultivation of "intellectual relations" and the "exchange of professors," came to enjoy in the United States "a real popularity." There is, however, reason to think that M. Viallate overestimates the potency of the measures which he designates; for, while they do not always profoundly influence even the relatively limited circles whose members they reach, they can hardly be expected deeply to influence general sentiment in a country so vast as the United States.

M. Viallate properly mentions Mr. Root's speech of Feb-

ruary 15, 1916, as proof of the previous growth in the United States of an opinion in favor of participation in the war. If he does not assign to the speech a position of prime importance, as a decisive factor in the sequence of events, he is not open to criticism to which American writers are not equally subject. The ramifications of the incident extended beyond the ordinary observation, and its full significance has not been generally grasped.

M. Viallate is usually so exact in his statements and his references that we may ascribe to pure inadvertence, in the writing of a name, his ascription (p. 198) to Mr. Knox of declarations of policy towards China, in 1899 and 1900, made by Mr. Hay.

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SPECIFIC AGENCIES FOR THE PROPER CONDUCT OF INTERNATIONAL RELATIONS¹

I

AMICABLE METHODS

THE subject which I have undertaken to treat in the present course on the history and nature of international relations I interpret as embracing all the various agencies or methods of international intercourse. Thus interpreted, it embraces both amicable methods, including negotiation, good offices, mediation, and arbitration; and non-amicable methods, including the withdrawal of diplomatic relations, retorsion and retaliation, the display or use of force, pacific blockade, reprisals, and war.

Practitioners of private law, who are accustomed to think of law only as it is administered by municipal or domestic courts, are often inclined to deny legal classification to the rules and methods by which international relations are conducted. Perhaps we may say that, in proportion as one has occasion to deal with international affairs, he ceases to be controlled or misled by such a conception. In the sense that force cannot always be immediately and effectively applied in the international sphere to the accomplishment of a particular object,

1. In *The History and Nature of International Relations*, ed. by Edmund Aloysius Walsh (New York, 1922), pp. 157-182.

and that definite and common agencies are not provided in advance for its application, the administration of international law differs from the administration of municipal law. But it by no means follows that law and agencies for the administration of law do not exist in the international sphere. In reality, organization exists in the domain of international relations and is made effective through its own appropriate agencies and methods.

(a)

Negotiation

The ordinary method of conducting international relations is that of negotiation, which we may call the normal legal mode of international intercourse. This process is carried on by the duly appointed official representatives of governments. In ordinary circumstances these representatives are the regular, permanent diplomatic representatives, but when the exigencies of the case seem to require it, special or additional representatives, official or unofficial, are employed.

By the rules of the Congress of Vienna, as amended by the Congress of Aix-la-Chapelle, diplomatic agents are divided into four classes :

- (1) Ambassadors, legates and nuncios;
- (2) Envoys, and ministers plenipotentiary;
- (3) Ministers resident;
- (4) Chargés d'affaires.

Legates and nuncios are the representatives of His Holiness, the Pope, while ambassadors constitute the highest rank among the representatives of civil and political powers. The most highly esteemed privilege of the ambassador is that, as the peculiarly personal representative of the head of his own State, he is supposed on all occasions to have a right of access to the head of the State to whom he is accredited, together with the happy and comfortable privilege, so conducive to tranquil slumber in the later morning hours, of compelling his diplomatic colleagues of inferior rank to wait for access to the secretary of state or minister of foreign affairs so long as there is an ambassador within sight or sound.

In one respect the ambassador shares titular but illusive honors with the envoy or minister plenipotentiary. The ambassador's proper full title is "*Ambassador Extraordinary and Plenipotentiary*," while the envoy's proper full title is "*Envoy Extraordinary and Minister Plenipotentiary*." In reality, neither the one nor the other is either extraordinary or plenipotentiary. These titles have come down from the days when

special rather than permanent missions were the rule, and when ambassadors and envoys were actually invested with full powers, in order to meet the extraordinary occasions which called for their appointment. Today the usual powers and credentials of ambassadors and envoys suffice only for ordinary occasions. No government would dream of concluding a treaty with an ambassador or envoy unless he had a special full-power. The minister resident, like the ambassador and the envoy, is entitled to an audience of the head of the State on the presentation of his credentials; but the envoy and the minister resident can claim no such right in the subsequent conduct of their business.

Chargés d'affaires are divided into two classes: (1) *Heads of missions*, and (2) *persons temporarily in charge in the absence of the head of the mission*. The first class merely represents the lowest rank of permanent diplomatic representation. Neither class is entitled to access to the head of the State, but is accredited or presented to the secretary of state or minister of foreign affairs.

Immunity from ordinary legal process belongs alike to all persons possessing a diplomatic character. This immunity is sometimes called extraterritoriality and, when interpreted in the sense of this highly metaphorical word, is often greatly exaggerated. It is sometimes said that diplomatic representatives are wholly exempt from legal obligation, and that their residences are foreign ground. Such conceptions are creatures of the imagination. They have no foundation in international law or practice. No man is above the law, in the sense of being exempt from the duty to obey it. The fact that a diplomatic officer is exempt from the service of ordinary legal process, rather than from the duty of obedience to the law, is readily demonstrated by the fact that if, after his commission of an act which the law criminally forbids, his government withdraws his immunity, he can be prosecuted for his offense. He is also subject to the exercise of what may be called preventive power, employed for the purpose of forestalling or staying the violation of laws and policing regulations made for the purpose of protecting life and property from destruction or injury. On the other hand, it is proper to repeat that persons having a diplomatic character are not subject to ordinary legal process for the enforcement of legal liabilities, either civil or criminal. This is a rule of international law, and the statutes of the United States provide for its enforcement by the courts, with appropriate penalties for its violation.

Diplomatic officers are not the only agents of the State of whom international law takes cognizance. Such agents com-

prise consuls, officers in command of the armed forces of the State, military or naval, and commissioners or other persons employed for special objects. But these non-diplomatic agents do not by virtue of their official character enjoy immunity from legal process unless it is specially provided for.

Before passing to other topics, it is proper to mention, in connection with the appointment, recall or dismissal of diplomatic agents, the question of personal acceptability. In this relation we use the technical terms *persona grata* and *persona non grata*. Objections may be made to receiving a diplomatic officer, or to his remaining at his post, on the ground that he either is or has become personally unacceptable. The reason of this rule is that the chief object of diplomatic intercourse is the cultivation of good relations, and that the attainment of this object is of more importance than the personal fortunes of an individual. Except in extraordinary emergencies, which seemed to compel immediate action, it has been the rule, where a minister has become unacceptable, to ask for his recall. But, if his recall should be refused, his dismissal would not then furnish a legal ground of complaint. Sometimes controversies on the subject have arisen from the fact that it was alleged or believed that personal unacceptability was assigned as a cover for a different and unavowed reason.

(b)

Good Offices

The term good offices is used in the double sense (1) of the unofficial representation or advocacy of interests of a particular government, and (2) the exercise of the function of an impartial adviser of the parties to a dispute.

The first sense is illustrated by the extension by a diplomatic officer, with the consent of his own government and the assent of the government to which he is accredited, of unofficial protection to the citizens of a third country, as has for many years been done by diplomatic and consular representatives of the United States, by instruction of their government, in behalf of citizens of Switzerland. Yet another illustration is the unofficial representation, by a neutral diplomatist, of the interests of one belligerent at the capital of the other belligerent in time of war.

An illustration of the second sense is where a diplomatic officer acts as a friendly intermediary and counsellor of two or more governments with a view to compose a difference between them. Such action necessarily presupposes the assent of the parties to the dispute, and is indeed usually preceded by

an invitation from them, collectively or individually. The employment of good offices, in this sense, is naturally a matter of much delicacy, and a diplomatic officer who is either called upon, or seems likely to be called upon, to act in such a capacity should be careful to avoid anything that might tend to affect his impartiality or to expose it to suspicion.

Good offices have been employed for many purposes and on many important occasions. Not only have they been used to adjust ordinary differences, but they have been employed to end war as well as to avert hostilities.

There is yet another sense, not falling within either of the two preceding categories, in which the term good offices is used, and that is in indicating the special character of a government's interposition in behalf of one of its citizens in presenting his claim against a foreign government. It is common to speak of intervention in behalf of private claimants. This is in fact one of the recognized forms of intervention, and it implies that the government presents the claim as a matter of legal right, and its request for redress is considered as a "demand," although in ordinary circumstances the word is not used. Sometimes, however, governments are asked by their citizens to present claims which may not have a strictly legal foundation, or which may have arisen out of an alleged breach of contract. The government of the United States has constantly taken the position that persons who contract with foreign governments should take into account and assume the risk of such governments' disposition or ability to perform what they may promise to do. In such cases, where the claimant's request for aid has seemed to be specially meritorious, the United States has presented his claim to the foreign government by way of "good offices," thus indicating that the claim is presented in a friendly sense and in the hope that it may be properly considered and adjusted, but without a direct and specific request for its admission and settlement. Action in this sense has sometimes been described as "unofficial good offices," but the word "unofficial" has been used only accidentally, or perhaps for the purpose of emphasizing the unofficial character of the proceeding. The word unofficial is in such a relation superfluous, since the employment of good offices is essentially an unofficial act. There is no such thing as "official" good offices, and the term is never applied to the process.

(c)

Mediation

Sir James Mackintosh once defined a mediator as "*a common friend, who counsels both parties with a weight proportioned*

to their belief in his integrity and their respect for his power." "But," said Sir James, "he is not an arbitrator, to whose decision they submit their differences, and whose award is binding on them." In substance mediation is an exercise of good offices. The distinctive meaning which the term conveys is that the proceeding is attended with a certain formality, with special emphasis on the advisory or recommendatory phase. Not infrequently a mediation resembles an arbitration, except in the vital point that it does not result in a decision.

One of the most remarkable mediations of the United States is that which was begun in 1866 and concluded in 1872 for the purpose of bringing to a close the war between Spain on the one hand, and the allied republics of Peru, Chile, Bolivia, and Ecuador on the other. As early as December 20, 1866, Mr. Seward instructed the diplomatic representatives of the United States near the belligerent governments to propose that a conference should be held at Washington. Spain was willing to accept the proposal on certain conditions. Bolivia and Ecuador were disposed to do whatever Chile and Peru might agree upon. Chile and Peru were willing to accept only on certain conditions, one of which was that Spain should acknowledge that the bombardment of Valparaiso was a violation of international law. This Spain refused to do, and Mr. Seward's first effort was thus unsuccessful; but, as the war itself eventually fell into a state of "technical continuance," he renewed his proposals on March 27, 1868. Spain substantially accepted. Chile thought that the conclusion of a definitive peace would be impossible, but intimated a readiness to enter into a truce, which would offer to neutrals all the guarantees and securities which they could properly claim. Bolivia concurred in Chile's views; Peru and Ecuador were disposed to accept unreservedly. On October 22, 1869, Mr. Fish, as Secretary of State, renewed the invitation for a conference. Such a conference was opened at the Department of State October 29, 1870, under the presidency of Mr. Fish. Owing to the question as to the bombardment of Valparaiso, it was found to be impossible to conclude a formal peace; but on April 11, 1871, the delegates in the conference agreed upon and signed an armistice by which the *de facto* suspension of hostilities between the belligerents was "converted into a general armistice or truce," which was to "continue indefinitely" and could not be broken by any of the belligerents "save in three years after having expressly and explicitly notified the other," through the Government of the United States, "of its intention to renew hostilities"; and it was provided that, during the continuance of the armistice, all restric-

tions on neutral commerce which were incident to a state of war should cease.

This was a very remarkable document, especially in the fact that, as a pledge to refrain from hostilities, it was more effective than a treaty of peace. Treaties of peace, although they often contain pledges of perpetual amity, are usually interpreted in this regard as declarations of a present intention rather than of a continuing obligation, the parties preserving the "sovereign" right thereafter freely to choose between peace and war. The armistice of 1871 precisely limited their freedom of action in that particular.

In recent days there has been an anxious agitation concerning the Island of Yap, which seems to have been destined to play the part of a storm center. Thirty-five years ago a dispute concerning it gave rise to one of the most interesting mediations of modern times. This dispute grew out of the action of a German Admiral who in 1884 raised the Imperial flag over the Island as a sign of occupation. In order that our thoughts may be clarified perhaps I should state that Yap is one of the Caroline Islands and that the Caroline Islands are in the Pacific Ocean. The act of the German Admiral provoked in Spain an outbreak of popular violence which was marked by attacks on the German Embassy and the German Consulate at Madrid. In order to avert hostilities, Prince Bismarck proposed the submission of the matter to the mediation of His Holiness the Pope. This proposal the Spanish Government accepted and on October 22, 1885, His Holiness as mediator presented to the two governments certain propositions by which the sovereignty of Spain over the Caroline and Pelew Islands was confirmed, but by which Germany acquired special commercial rights, together with the right to establish a naval station and a coal depot in the islands. In conformity with the recommendation of His Holiness, his propositions were embodied by Germany and Spain in a protocol which was signed by their Ambassadors at Rome on December 17, 1885.

In the discussion of good offices we have seen that considerations of propriety and of delicacy have tended to embarrass and prevent the employment of the process. The Convention for the Pacific Settlement of International Disputes concluded at The Hague on July 29, 1899, undertook to remove this difficulty by stipulating that in case of serious disagreement or conflict, before an appeal to arms, the signatory powers should as far as possible have recourse to the good offices or mediation of one or more friendly powers; that an offer of mediation might be made by powers, strangers to the dispute, on their own initiative, even during the course of hostilities, and that the exercise

of this right should never be regarded by any of the parties to the conflict as an unfriendly act. These stipulations denoted on the part of their authors the possession of an intelligent and practical understanding of the nature of international relations and tended to enlarge the opportunity for the exercise of the mediatorial function.

(d)

Arbitration

The term arbitration, in private law, is often used to denote an extra-judicial, or even an extra-legal, proceeding of a conciliatory nature. This is not and never has been the meaning of the term in international law, and international arbitration never has been understood or practiced in this sense. The signatories of The Hague Convention were altogether justified in including in its stipulations the declaration that "*international arbitration has for its object the settlement of differences between states by judges of their own choice, and on the basis of respect for law*"; and in conformity with this declaration they consistently "recognized" arbitration as "the most effective, and at the same time the most equitable, means of settling disputes" of a "legal nature" which diplomacy had failed to settle.

The supposition that international arbitrators have shown a tendency to make diplomatic compromises, that they have failed to apply legal principles and to give weight to legal precedents is entertained, we must assume, by those who have not comprehensively studied the actual record of arbitral proceedings. No doubt the utterances and complaints of disappointed litigants have also contributed to produce misconceptions. There is a common saying among members of the Bar that if an attorney loses his case he is hardly to be censured if he gratifies his sense of disappointment by railing at the court.

In reality there is manifest, among some of those who discuss the subject, a tendency to misconceive and over-rate what is called the "judicial" element in the conclusions of municipal courts, as well as to misconceive and over-rate the element of "compromise" involved in the conclusions of international arbitrators. While the decisions of international arbitrators, like the decisions of municipal courts, have the character of final judgments, and are in this sense alike "judicial," we are safe in affirming that there is no such thing in the affairs of men as purely "judicial" deliverances, based on "pure law," without any element of compromise. Such things are not of this world. Why do courts divide? Why do judges dissent? Why does

the single judge hesitate and reserve his decision, and, when he eventually renders it, confess the doubts that have troubled him and have rendered the result uncertain? The answer to these inquiries is found in the fact that such are the processes of human thought. Our conclusions represent the anxious balancing of conflicting considerations and the effort, if we be honest, to give most weight to those that may seem to us to be the most meritorious. It is, therefore, no reproach to international arbitrators, nor does it impeach their integrity of purpose or the judicial character of their action, to admit that, as human beings determining human disputes, they have not been exempt from the limitations of human thought. Moreover, as one to whose lot it has fallen actually to examine the work of international arbitrators, from the earliest times to the latest, I am prepared to pronounce unjustified the invidious imputation to them of a disposition to substitute diplomatic compromises for conclusions based on law and justice.

II

NON-AMICABLE METHODS

Writers have been more or less accustomed to group all methods short of war as "pacific." Such a division, involving a special and much enlarged use of the word "pacific," necessarily produced misconceptions, and I have therefore ventured to depart from it. I have, therefore, divided methods of redress into the two general classes of Amicable and Nonamicable, the amicable processes including those that do not, and the non-amicable those that do not and those that do involve the use of force.

(a)

Non-Forcible

Rupture of Diplomatic Relations

As the first example of nonamicable methods I may mention the rupture of diplomatic relations. The withdrawal of diplomatic representation, unless for a cause personal to the representative, denotes dissatisfaction with the conduct of the government with which ordinary intercourse is thus ended or restricted. It thus indicates the existence of a state of ill-feeling which is likely to increase unless the cause of it is removed. Between nations, as between individuals, the results of continued ill-feeling never can be confidently foretold. There is also the possibility that they may lead to exasperation, and that under the stress of nervous tension blows may be ex-

changed. While such results may not occur, it is not wise wholly to exclude it from the range of possibility.

Retorsion, Retaliation

Retorsion has been defined as "the appropriate answer to acts which it is within the strict right of a state to do," but which, if not indicative of a spirit of unfriendliness, places the citizens of foreign states under special and injurious disabilities. If the foreign state whose citizens are thus injured replies by imposing similar disabilities, this is called "retorsion." Retorsion may, therefore, be called retaliation in kind. It is employed largely in matters of commerce, specially where differential or discriminating duties are imposed on the citizens, the vessels or the produce or manufactures of the foreign state.

We distinctively use the word retaliation where the countervailing measure exceeds the injury which it is sought to redress or to stay. The range of retaliation is not precisely defined. It may take the form of menace or of actual use of force, and in its latter aspect it is brought within categories hereafter to be discussed.

In the early international relations of the United States much was heard of measures of embargo and non-intercourse. Both these measures may be regarded as falling under the head of retaliation.

By Joint Resolution of Congress of March 26, 1794, an embargo was laid for thirty days on all ships and vessels in ports of the United States bound for any foreign port or place. The immediate cause was the British Order in Council of November 6, 1793, restrictive of maritime commerce. On April 18, 1794, the embargo was extended to the 25th of the following month, and by an Act of May 22, 1794, the exportation of munitions of war was prohibited for a year, while their importation free of duty was authorized for two years. This condition of things was brought to an end by the Jay Treaty towards the close of 1794.

The same retaliatory device was revived by Jefferson, under whose presidency a law was passed on December 22, 1807, forbidding the departure of vessels from the United States, foreign vessels being allowed, however, to depart either loaded or in ballast on receiving notice of the act. This measure was intended to redress and to prevent the injuries inflicted on American commerce under Napoleon's Berlin Decree of November 21, 1806, and the British Blockade Decrees and Orders in Council.

The embargo was eventually repealed by the Act of March

1, 1809, which substituted a policy of non-intercourse. These measures of embargo and non-intercourse may be considered as precursors of the War of 1812.

(b)

Forcible

Reprisals

Reprisals, says Vattel, are used between nation and nation in order to do themselves justice when they cannot otherwise obtain it. Thus,

If a nation has taken possession of what belongs to another; if it refuses to pay a debt or repair an injury, or to make just satisfaction, the latter may seize what belongs to the former and apply it to its own advantage, till it obtains full payments of what is due, together with interest and damages, or keep it as a pledge till the offending nation has made satisfaction. The effects thus seized are preserved, while there is any hope of obtaining satisfaction or justice, but when hope disappears they are confiscated and then the reprisals are accomplished.

This is a vivid picture of reprisals as they have usually been conceived.

In former times it was not uncommon for a sovereign to authorize his subject forcibly to seek and obtain his own redress. For this purpose he issued to his subject what was called a letter of reprisal. Such letters were issued even in times of nominal peace, but the use of them necessarily tended to obscure the distinction between peace and war. For this reason the granting of letters of private reprisal fell into disuse more than one hundred years ago, and the reprisals that have been made during the past century have been national measures carried out by national agencies.

As reprisals involved the employment of force, they necessarily tended to result in war, and if we examine the history of reprisals we find that they usually resulted in war where the nation to which they were applied was physically able to resist.

An early example of this tendency, exhibiting a blend of private and of public reprisals, is narrated by Ward in his *History of the Law of Nations* (1795), I, 294-296. Although some of the details are amusing, the results were most serious and perhaps we may say that in this regard the affair was rather human. According to Ward, in 1292 two sailors, the one Norman, the other English, quarreled in the Port of Bayonne and began to fight with their fists, and the Englishman being the weaker is said to have stabbed the other with his knife. The local magistrates failing to intervene, the Normans applied to their

King, who authorized them to take their own revenge. This they did by putting to sea and seizing an English ship, some of whose crew they hung up to the masthead, together with some dogs. The English instantly retaliated; two hundred Norman vessels scoured the English seas hanging all the seamen they could find, while the English seized the Normans and put them to death without quarter. "The affair then," says Ward, "became too big for private hands, and the governments interposing in form, it terminated in that unfortunate war, which by the loss of Guienne, entailed upon the two nations an endless train of hostilities till it was recovered."

It would exceed the limits of my time and space to narrate examples of reprisal during the past hundred years, such as the famous case of Don Pacifico, the proceedings against Mexico in 1861 resulting in an attempt by the French to set up an empire in that country, and various other instances the history of which may readily be found in the books. There is one case, however, to which I desire particularly to advert because it has so often been misconceived and mistaken. I refer to the bombardment of Greytown by the U.S.S. *Cyane* in July, 1854. This case has been cited as a precedent for the occupation by the United States of Vera Cruz in 1914, but no citation could be wider of the mark. When Greytown was bombarded, the community, as it was called, was not definitely under the jurisdiction or subject to the control of any recognized sovereignty.

It did not [said President Pierce in his annual message of December 4, 1854, explaining the action of the United States] profess to belong to any regular government, and had, in fact, no recognized dependence on or connection with anyone to which the United States or their injured citizens might apply for redress or which could be held responsible in any way for the outrages committed.

There is more in President Pierce's message to the same effect, but it is useless to make further quotations since the passage cited clearly states the point that the Government of the United States justified its action on the ground that it was not dealing with an organized political society, to which competency to exercise the rights and to discharge the obligations of a government could be imputed.

Pacific Blockade

To "pacific blockade" I give a separate heading without intending to intimate that the subject is entitled to an independent classification. Different opinions have been expressed as to the nature of the measure, and indeed as to whether it may properly be admitted to exist; but this difference may be due to the combination of words in the title, the word "block-

ade" having been used to designate a well-recognized belligerent operation. Nor does the word "pacific" fortunately qualify a measure of open force and coercion. But, if we close our eyes to the inappropriateness of the words and consider the nature of the process, we may see that we have, under the title "Pacific Blockade," merely a form of reprisal. Reprisals, although classified as a measure short of war, in the sense that they do not proceed upon the assumption of the present existence of the legal condition of things called a state of war, are not otherwise "pacific"; and so with pacific blockade. If the measure is not extended, as is belligerent blockade, to the citizens, vessels and property of third powers, it presents nothing exceptionable from the legal point of view, so long as reprisals continue to be acknowledged as a legal process.

Calvo cites, as the first example of pacific blockade, the action of France, Great Britain and Russia in 1827, in obstructing access to the coasts of Greece, where the Turkish armies were encamped, the representatives of the three powers continuing to assure the Sultan of their friendship, and to declare that peace was unbroken, although the measure they adopted served to paralyze his armies. In June, 1831, a French fleet, in order to obtain reparation for injuries done to French subjects in Portugal during the reign of Dom Miguel, "blockaded" a number of points on the Portuguese coast and captured a large number of Portuguese ships. A state of war did not ensue, and on July 14, 1831, a treaty was promptly concluded by which reparation was promised to French subjects, while all Portuguese ships of war and of commerce that had been captured by the French fleet were restored. In 1833 France and Great Britain, with a view to compel the assent of the Netherlands to the recognition of the Kingdom of Belgium under the treaty of London, blockaded Dutch ports, and a state of war did not follow. In 1838, however, when France instituted a pacific blockade of certain Mexican ports, the Mexican Government, resenting the act, declared war, and expelled French subjects from its territory. On the other hand Mexican men-of-war as well as merchant vessels were seized by the French, and the fortress of San Juan d'Ulloa was reduced. The quarrel between the two countries was terminated by the treaty of March 9, 1839, by which it was agreed to submit to a third power the decision of the questions (1) whether Mexico could claim restitution of the Mexican ships of war captured by the French after the surrender of the fortress of Ulloa or compensation therefor; (2) whether indemnities could be claimed for Frenchmen who had been expelled from Mexico; and (3) whether Mexican ships and cargoes sequestered during the

blockade and subsequently captured by the French in consequence of the declaration of war ought to be considered as legally acquired to the captors. The Queen of Great Britain, who was chosen as arbitrator, decided on August 1, 1844, that, after the departure of the French plenipotentiary from Mexico, followed by hostile operations on the part of the French against the fortress of Ulloa and the Mexican fleet, and the actual declaration of war by the Mexican Government, and the expulsion of French subjects from its territory, there was a state of war between the two countries, and that neither restitution of the vessels and cargoes mentioned nor the payment of indemnities could be exacted.

One of the most interesting as well as most picturesque cases of pacific blockade is that which the British Government conducted against Brazil, in the seventh decade of the last century, on a demand for reparation for the plundering of the British barque *Prince of Wales* on the Brazilian coast in 1861, and a further demand for redress for what was termed an outrage on three officers of the British man-of-war *Forte* by the Brazilian guard at Tijuca Hill, near Rio de Janeiro. As the British demands were refused, the British admiral instituted a pacific blockade of the port of Rio de Janeiro, and seized and detained five Brazilian vessels as an act of reprisal. It was subsequently arranged that the claim in the case of the *Prince of Wales* should be paid under protest and the captured vessels released, the Brazilian Government assuming responsibility for any losses which might have resulted to the citizens of third countries, and that the case of the *Forte* should be submitted to arbitration. As arbitrator, the parties chose Leopold I, King of the Belgians. The so-called outrage began with the arrest by the Brazilian guard, at Tijuca Hill, of three officers of the British admiral's flag-ship, the *Forte*, these officers being a lieutenant, a mid-shipman, and the chaplain. It appeared that these officers, at seven o'clock in the evening, as they were passing the police guard-house, on their way down the hill, were accosted by a sentinel, who advanced and inquired as to their identity. Here the accounts begin to diverge. On the part of the British it was alleged that the action of the Brazilian police was aggressive and violent, particularly with regard to the chaplain, and that all three officers, besides having been treated with great brutality, were incarcerated over night under circumstances of peculiar indignity. The Brazilian Government, on the other hand, represented that the complainants had dined at a certain hotel, where they had "two bottles of Bordeaux and one-half bottle of cognac"; that, on their way down the hill, they attempted to "unhorse an equestrian"; that, when they

were accosted by the guard, they "began to strike him with their sticks," and compelled him to summon aid; that, even after they were "deposited" in the guard-house, they showed themselves "haughty and scornful"; and that, although they "were not completely drunk," they "appeared not to be in full possession of their mental faculties." These allegations, it is only just to say, the complainants altogether denied, although they admitted that the officer of the guard, when they were locked up, provided them with paper and with a pack of cards, and offered to one of them a bed. The demands for redress made upon the Brazilian Government were (1) that the ensign of the guard be dismissed from the service, (2) that the sentry who was said to have begun the attack be adequately punished, (3) that an apology be made by the Brazilian Government, (4) that the chief of police of Rio de Janeiro be publicly censured for certain acts prior to the complainants' release. On June 18, 1863, the arbitrator rendered an award, in which, after reciting the proofs submitted by the parties, he held that, in the manner in which the Brazilian laws were applied in the case, there had been neither premeditated nor actual offense towards the British Navy. It should be stated that, after this decision was rendered, the British Government sent a representative on special mission to Rio de Janeiro to express regret for the circumstances under which the friendly intercourse between the two countries was suspended, to disavow any intention to offend the dignity of Brazil, and to propose the renewal of diplomatic relations. The Emperor received these assurances with an expression of satisfaction; diplomatic relations were restored, and the incident was ended.

Further examples of pacific blockade may be found in the books, and in this relation I would particularly commend a late edition of Hall's work on *International Law*, and Holland's *Studies in International Law*. Both these eminent authorities reached the conclusion that, so long as the measure is not extended to the prohibition of access to the citizens, vessels and property of third countries, no valid objection can be made to pacific blockade as a measure of reprisal.

War

Much confusion may be avoided by bearing in mind the fact that the term war is used in two senses, comprehending (1) acts of hostility, or war *de facto*, by one nation against another without a formal declaration, and (2) the legal condition of things called a state of war, in which the parties prosecute their claims avowedly as belligerents.

Nothing could be more unfounded or more misleading than

the supposition that a government cannot be said to commit acts of war, or to make war, unless war, or a state of war, has been declared or otherwise admitted to exist. Whether the acts of a government are to be deemed acts of war depends on their nature and not on what it may see fit to call them. When one government prosecutes its claims against another government by force, it commits acts of war, even though, as in the case of reprisals, a declared or avowed state of war may not have supervened, and hence we find that the Constitution of the United States, in reserving to the Congress the power to declare war, also expressly reserved to it the power to authorize reprisals. In 1883 the project for the building of a tunnel under the English Channel, to connect England and France, was killed by the publication by Lieutenant Colonel Maurice, then of the British War Office, of his small volume entitled "*Hostilities Without Declaration of War*," in which he showed that in the hundred and seventy-one years, from 1700 to 1870, inclusive, in the almost innumerable wars that had taken place, there were less than ten clear cases of a "declaration of war" prior to hostilities, although, when a state of war was eventually declared or admitted to exist, it was held to relate back to the commencement of hostilities. It may be superfluous to say that, if two nations declare war against one another, the legal condition of things called a state of war then comes into existence, although no actual force whatever may as yet have been employed. On the other hand, force may be employed by one nation against another, as in the case of reprisals, and yet no "state of war" may arise. In such a case there may be said to be acts of war, but no state of war. The distinction is of the first importance, since, from the moment when a state of war supervenes, third parties become subject to the performance of the duties of neutrality as well as to all the inconveniences that result from the exercise of belligerent rights.

In treating of war we may at once exclude the subject of private wars, which are no longer recognized, and may confine our attention to public war.

Limited War

Writers have been accustomed to speak of two kinds of war, "perfect" and "imperfect." The former describes the condition in which the whole nation is said to be at war with another nation and all the members of each are authorized to commit hostilities against all the members of the other in every case permitted by the laws of war; the latter, the condition in which hostilities are limited as to places, persons, and things. For the terms "perfect" and "imperfect," I have ventured to sub-

stitute the terms *general* and *limited*. To ascribe to war perfection, unless indeed it should result in utter annihilation of one of the parties, seems inappropriate, while, to ascribe to it imperfection for falling short of that goal, might justify the reproach of inhumanity. In reality, limited war is war, and is as nearly perfect as any other kind, as far as it goes.

One of the best-known examples of a limited war, which happens to be furnished by our own history, is the condition of things which existed between the United States and France from 1798 to 1800. Engagements took place at sea, vessels were captured, and prisoners were taken. In the case of one of the captures (*Bas v. Tingy*, 4 Dall., 37), the Supreme Court of the United States held that, as Congress had raised an army, stopped all intercourse, dissolved all treaties, built and equipped ships of war, and commissioned privateers the two countries were "in fact and in law at war"; that an American vessel fighting with a French vessel, to subdue and make her a prize, was "fighting with an enemy accurately and technically speaking"; and that the provisions of the law relating to prizes made in war were applicable to the case.

General War

General war is not limited as to places, persons, and things, but authorizes all acts permitted by the laws of war against the enemy's state and its members. It may be said that, in this sense, war is merely general reprisals carried on by states which have resolved to conduct their contention by force.

In considering the cases in which the use of violence against persons or property may or may not be permitted by the laws of war, we are confronted with two theories of the nature of war. According to what we may call the original theory, all persons belonging to the enemy, including women and children, may lawfully be attacked and killed and their property destroyed. This comports with what I venture to call the annihilative or extirpatory conception of the object in view. This conception is exemplified in the old rule that it is permissible, if not meritorious, to put all the inhabitants of a besieged city to the sword, to say nothing of the commendations, in earlier writers, of the use of violence against all persons and property of the enemy.

On the other hand, towards the end of the eighteenth century there was propounded a different theory, formulated in the well-known sentence of Rousseau, that war is a relation, not of individual to individual, but of state to state, and that men are enemies, not as individuals, but only as agents of the state. This theory has been formally accepted by many governments

and has to a certain extent been incorporated in their legislation. It has not been accepted by the British Government, nor has it been accepted by the Government of the United States. From this circumstance we are not by any means to infer that these two governments have sought to give full effect to the earlier rule in their practice. Both have accepted and advocated ameliorations of the earlier rule, and have advocated and accepted such ameliorations as a part of the modern law of war, just as the governments which have accepted the rule that war is a relation, not of individual to individual, but of state to state, have not consistently carried out the theory in all its logical consequences. In this way the nominal adherents of the earlier theory and the nominal adherents of the later theory have been able to a great extent to meet on common ground.

No doubt the subject which has chiefly served to keep the two schools apart is that of the liability of private property at sea to capture and confiscation. Almost two centuries ago advanced nations discarded the capture and confiscation of enemy private property on land. They did this perhaps not so much on grounds of "humanity" as on grounds of enlightened public policy, in order that men might, after the clash of arms was over, be enabled to resume the pursuits of civilized life, instead of perishing in unproductive wastes or roaming the forests, after the manner of wild animals, for food. But, because of the usefulness of ships as instruments of war, and of the relief of internal stress by foreign commerce, strong maritime powers manifested an unwillingness to abandon the capture of private property at sea, and, as the logical starting point of the proposed exemption was the abolition of the doctrine of individual enmity, they refused to accept the new theory. The statement is constantly reiterated that the United States, in 1856, proposed to the powers the abolition of the capture of private property at sea. This statement is true only in a strictly qualified sense. The United States did not propose to do away either with the law of contraband or with the law of blockade. Thus limited, the effect of the proposal, had it been accepted, would have been much slighter than is generally imagined. The history of wars, including that of the last great war, demonstrates that "measures of blockade," whatever this may mean, and contraband lists may readily be so extended as to reduce the exemption of private property from maritime capture to negligible proportions. It is therefore evident that, if the American proposal of 1856 had been accepted, its value would have depended on the power and the will of neutrals to make it practically effective.

Wars, whether limited or general, may end either *de facto* or by virtue of treaties of peace. For both modes international law provides appropriate rules. Where war ends purely *de facto*, the rights of the parties are determined by the rule of *uti possidetis*; where the war ends by a treaty, this rule may also be invoked, where nothing is expressed to the contrary. It may be superfluous to remark that it belongs to each independent state, in the exercise of its sovereign rights, to decide for itself whether it will end a war in the one or the other of these two modes.

At the present moment a writer or speaker who ventures to discuss international relations seems to lay himself open to the charge of incompleteness of thought if he fails to present or to commend some proposal by which war is to be immediately and finally abolished. Whether this expectation proceeds from a desire to end the numerous armed conflicts still going on, or from a wish to preserve a fancied condition of peace which does not in fact exist, I am obliged to regard it as essentially impulsive and superficial. At a meeting of the so-called League to Enforce Peace held at Philadelphia in June, 1915, an eminent speaker expressed disappointment that certain persons whom he named had not presented a plan for the termination of the war then raging in Europe. Much sounder was the view expressed by the late James J. Hill, when, on the outbreak of the war early in August, 1914, in response to the request of a reporter for an opinion as to when the war would end, he sentimentiously replied: "Young man, you can ask more fool questions in five minutes than I can answer in a week. The war will end when somebody gets licked." As the war progressed in area and in intensity, orators often spoke of it as "a war to end wár." Whether those who used such phrases have now forgotten them, it is immaterial and would be unkind to inquire. The intoxicating effects of illusive phrases are beyond the reach of prohibitory legislation. No war ever has been or ever will be fought to end all war. Wars proceed from definite, concrete causes connected with conflicts of opinion or of interest by which the passions of men are excited. The conflicts may be far less vital or important than the parties suppose them to be. They may indeed be altogether unimportant, except in the particular that they produce the nervous tension which impels human beings to resort to force. On the other hand, the differences may be of a profound and far-reaching character, such as to produce a deep sense of injustice and unrest. Whether in such conditions the tendency of men in the mass to seek their ends by violence can be restrained, is always a matter of conjecture. While threats or combinations of force conceivably

may exert a restraining influence, they may also have the opposite effect, and never can be counted upon with entire confidence. The late Count Hayashi, in his *Secret Memoirs* (pp. 226-227), is represented as having written that the Japanese public is ordinarily rather cool, and indeed almost indifferent, toward foreign affairs, but that, when something happens to force attention in that direction, "*then at once the public seems to get intoxicated, as though drunk with alcohol, and it behaves as if it were not able to discriminate.*" Count Hayashi need not have imputed this tendency to his own people as a peculiarity. The same tendency to get excited at the prospect of a fight, whether between dogs, between individual men, or between nations, more or less characterizes all people. When an acute international situation arises, the possibility of a physical contest at once comes into view. Sudden excitements thus spring up, and the capacity to think clearly and to reason calmly, instead of being popularly commended, may expose to suspicion and even to censure the few who still retain it. In such a condition of things, the precipitation of a war is not a difficult task. Wars will diminish in proportion as men, when confronted with apparent conflicts of opinion or of interest, come to think first of peaceful rather than of forcible solutions. To the attainment of this end the systematic employment of peaceful and tranquillizing methods, such as good offices, mediation, and arbitration, is necessarily helpful.

The extent to which such agencies or methods may be successfully employed may be said to depend rather upon the disposition of the parties to accept them than upon the nature of the dispute. If, for instance, arbitration has failed to prevent a certain war, it by no means follows that arbitration could not have settled the dispute to the satisfaction of the parties, if they had been willing to try it. Wars have often grown out of disputes far less serious and complicated than some of those which arbitration has actually settled. In the future, just as in the past, the preservation of peace, internal as well as external, will continue to depend on the cultivation of a spirit of justice and of toleration, and the exemplification of that spirit, by men and by nations, in their dealings with one another.

GORGAS, REDEEMER OF THE TROPICS¹

THE PROPOSED MEMORIAL TO GENERAL GORGAS AT PANAMA—AN INSTITUTE OF TROPICAL AND PREVENTIVE MEDICINE

I HAVE often told the story of how, more than ten years ago, during the building of the Inter-oceanic Canal, when the Culebra cut was still a problem and the Gatun dam was incomplete, I found myself one day in the Tivoli Hotel on the Isthmus of Panama. I was on the last lap of a long journey, in which I had visited many countries and traversed many seas, and, palled by the flatness or frenzied by the sparkle, as the case might be, of perhaps more than fifty-seven well-advertised varieties of mineral beverages, I longed for a glass of plain fresh water. Seating myself at a table I seized a carafe and, as I filled a tumbler, inquired of a waiter whether the contents could safely be drunk. The waiter, with a tone of proud assurance, replied: "Sir, that water is certified by Dr. Gorgas."

Never did words carry a greater import. In a region whose name had been a synonym of pestilence and death, the connection of the two great oceans by the Panama Canal, often called the dream of the ages, was then in course of prompt and confident realization. The jungle had been robbed of its terrors, and in place of the "reeking miasma" that had formerly risen from the softened ground the hills and valleys were swept with salubrious airs, in which men worked with security and comfort. This marvelous transformation had been wrought by the genius and devotion of one man, William Crawford Gorgas, Surgeon-General of the United States Army, and it may be said that while the Panama Canal stands today as a monument to Goethals and his associates, it was Gorgas, the Redeemer of the Tropics, who made possible its safe and humane construction.

Gorgas's achievement at Panama was, however, only a culminating point in a continuous life-work which, far from ending on the Isthmus, was incessantly carried on, without abatement of energy or of aspiration, to the day of his death. He

1. Reprinted from *The American Review of Reviews*, February, 1922.

died in harness; and it now remains for a grateful world, instructed in the beneficence of his labors, to provide for their perpetuation and development through all time.

Imbued with this sentiment, it was the happy fortune of Dr. Belisario Porras, President of the Republic of Panama, and an intimate friend of Gorgas, to initiate a movement for the creation of a unique memorial, which should at once symbolize the life-work of the great world physician, and permanently extend its benefits to all parts of the globe. This was nothing less than the establishment at the City of Panama of an institution to be known as the Gorgas Memorial Institute of Tropical and Preventive Medicine. This proposal was doubly felicitous, for, while the memorial is to be associated with the scene of Gorgas' most notable triumph, the installation of the scientific laboratories, not only in the heart of the tropics, but also on the line of the interoceanic canal, is conceived to be ideal from the point of view of combined practical convenience and scientific effectiveness.

OPENING TROPICAL EMPIRES

Gorgas' victory over tropical fatality in Panama demonstrated the possibilities which the Gorgas Memorial Institute will advance to their logical conclusion, opening up for high and diversified industrial development some of the richest parts of the earth, both in the Western and in the Eastern Hemispheres. Under favorable sanitary conditions, this would inevitably result from the pressure of population as well as from the desire for riches. Gorgas himself declared: "I believe that again great tropical empires will be known, such as Egypt and Babylon; that from the period of Panamanian sanitation will be dated the beginning of the great white civilization in these parts."

The scientific laboratories of the Gorgas Memorial Institute, situated at Panama, will afford specialists from all parts of the world an opportunity to conduct researches in tropical and preventive medicine. The Institute will also permit a limited number of graduate medical students from American and foreign colleges to specialize in tropical medicine by making investigations in the tropics themselves. Of at least equal importance is the plan of the Institute to make practical application of the means of prevention of all diseases through the maintenance of health standards and scientific sanitation. This will lead to the sending of scientific expeditions to such countries as may be afflicted with epidemics of the diseases in the prevention of which the Institute will specialize.

WORK IN OUR OWN SOUTH

In connection with the Gorgas Memorial Institute at Panama, permanent provision is at the outset to be made in the southern portion of the United States for the training of men and of women who will become workers in the county units of the Southern States health organizations. Up to the present time health and sanitary work in the South has been hampered by the lack of a skilled personnel to carry it on. Men with medical degrees from leading universities have been disinclined to take up work of that kind for the small salaries paid.

With a view to meet the immediate need for county health officers, sanitary engineers, and health nurses possessing a knowledge of Southern problems and of health and sanitary measures, it is proposed to establish the Gorgas School of Sanitation at Tuscaloosa, Alabama. This, the first field extension of the Institute, is a very fitting tribute to General Gorgas, who was himself a native of Alabama. His mother was for years the Librarian of the University of Alabama, and his sister now holds the same position. The University of Alabama has offered the Gorgas School of Sanitation the use of a building, for the beginning of classwork, as well as the free use of all university facilities for the students of the school.

CAREER OF GENERAL GORGAS

The nature of the plans now in course of fulfillment, for the creation of a memorial which shall at once typify the life of Gorgas and permanently benefit the world, renders peculiarly appropriate a brief sketch of his career, which was so strikingly characterized by the constant effort to do good to his fellow-men.

William Crawford Gorgas was born on October 3, 1854, in Mobile, Alabama. His father, Josiah Gorgas, a graduate of the United States Military Academy, served with distinction during the Civil War as Chief of Ordnance of the Confederacy, residing in that capacity at Richmond, Virginia, and became at the close of the war the vice-chancellor of the University of the South at Sewanee, Tennessee, and later president of the University of Alabama.

In this way it happened that the son, William Crawford, spent part of his boyhood at the Confederate capital, and afterward studied at the University of the South at Sewanee. Subsequently he attended the Bellevue Hospital Medical College, now a part of New York University, and, after a year spent as an interne at Bellevue, he was appointed Assistant Surgeon in the United States Army, with the rank of First Lieutenant.

Nothing is known of these earlier years to presage the dramatic interest of his later career.

It is not many years since our Southern States were every now and then visited with scourges of yellow fever. The epidemic of 1878 is estimated to have cost more than 13,000 lives in the Mississippi Valley alone, together with a loss of more than \$100,000,000. It was in 1882 that Gorgas, in Texas, had his first contest with yellow fever.

AT HAVANA IN THE SPANISH WAR

But it was in Havana in 1898, as a Major in the Medical Corps of the United States Army, during the war with Spain, that he again found himself in a struggle with the dread disease on a large scale. When the United States Army went to Havana in 1898, yellow fever was still thought to be a "filth disease," and no actual method of prevention was known.

The military authorities [Gorgas wrote] concluded that Havana offered the opportunity that the United States had been awaiting for the past two hundred years. Thinking that yellow fever was a filth disease, they believed that if we could eliminate Havana as a focus of infection, the United States would cease to be subject to epidemics. This meant so much to the United States financially and otherwise that the authorities determined to make all other efforts secondary to this sanitary effort.

By the middle of 1900 I believed that Havana was cleaner than any other city had ever been up to that time, but in spite of all this work and care, yellow fever had been steadily growing worse ever since we had taken possession of the city, and in 1900 there was a greater number of cases than there had been for several years. The Cubans twitted us with the fact that all our cleaning up and expenditure not only had not bettered things, but had even made them worse. They called attention to the fact that the very cleanest and best kept portions of the city were by far the worst sufferers from yellow fever, and the evidence was so staringly before our eyes that we had to acknowledge the truth of what they said. The health authorities were at their wits' end. We evidently could not get rid of Havana as a focus of infection by any method we then knew.

DISCOVERIES OF THE REED BOARD

Into this settled and seemingly hopeless gloom there soon came a ray of light. The demonstrations of the Reed Board, appointed by the Secretary of War, William Howard Taft, to investigate the cause and the means of transmission of yellow fever were as convincing as they were spectacular, and proved beyond doubt

that the only means by which yellow fever is conveyed from man to man is by the bite of the female *Stegomyia* mosquito; and that this mosquito, to become infected, must suck the blood of the yellow-fever

patient within the first three days of his disease; that after biting the patient, twelve to twenty days must elapse before the mosquito herself is able to convey the infection; that after the non-immune human being has been bitten by the infected *Stegomyia* mosquito, an incubation period of from three to six days elapses before the man begins to show symptoms of yellow fever; that the disease itself is caused by a parasite, and that the parasite is sub-microscopic.

Gorgas, who was then Chief Sanitary Officer of Havana, immediately grappled with the problem of the practical application of the discoveries of the Reed Board. Vaccination was first tried, but its inefficacy was soon demonstrated. Gorgas then proceeded to screen private homes and hospitals so as to prevent the mosquito from biting anyone afflicted with yellow fever, besides fumigating the entire vicinity wherever the fever developed. Following this, he attacked the mosquitoes themselves, destroying their breeding places and killing them in the larval stage by pouring oil on all bodies of water, from the backyard pools and the puddles in the gutters upon the roofs to the large lakes and ponds. For the ten years preceding the American occupation of Havana there had been more than 5,000 deaths per year from yellow fever. In February, 1901, Gorgas inaugurated his sanitary measures, with the result that the plague rapidly disappeared, the last case occurring in September of the same year.

In addition to the campaign against the yellow-fever mosquito, Gorgas directed equally effective attacks on the *Anopheles* mosquito, which was the cause of malaria. Prior to 1901 Havana averaged 300 to 500 deaths per year from malaria, but from that time on the number sharply declined, until in 1912 only four deaths from malaria occurred in the city.

CLEANING UP THE CANAL ZONE

It was but natural that the United States Government, recognizing the great work of Gorgas in Havana in stamping out yellow fever and malaria, should place him in charge of the sanitation of the Canal Zone. When in the middle of the last century the Panama railway was constructed, it was commonly said that the laying of every cross-tie cost a human life. The fundamental relation of sanitation to the digging of the Canal can best be understood when it is realized that the French in their earlier attempt to build it lost each year about one-third of their white force by deaths from yellow fever.

It was loss of life rather than lack of skill, of machinery or of money, that brought disaster to their efforts. If under the American administration the same ratio of loss by disease had occurred, it is estimated that this would have meant the loss

of approximately 3,500 American lives a year, the effect of which on public sentiment and the progress and eventual completion of the work can only be conjectured. Gorgas keenly realized the great responsibility of his assignment as Chief Sanitary Officer of the Canal Zone. As Frederic J. Haskin has well said: "Not mountains to be leveled, nor wild rivers to be tamed, nor yet titanic machinery to be installed, presented the gravest obstacles to the Canal builders. Their most feared enemies were none of these, but the swarm of mosquitoes that bred in myriads in every lake, in every tiny pool, in every clump of weeds on the rain-soaked, steaming tropical land. Each mosquito was a messenger of death. The buzzing, biting pests had defeated the French in Panama without the French ever having recognized the source of the attack."

Fully understanding the situation, Gorgas planned accordingly. He divided the Zone into twenty-six sanitary districts, each in charge of a sanitary inspector having from twenty to one hundred laborers with the necessary foremen. The well-known Gorgas system of sanitation was then applied to eliminate the breeding places of mosquitoes; and by the autumn of 1905 he had completely stamped out yellow fever and subdued malaria in Panama.

The ridding of the Canal Zone of yellow fever and malaria will be recorded for all time as an epoch in the annals of preventive medicine. Taking for comparison the previous French death rate, the work of the Sanitary Department under Gorgas during the building of the Canal may be said to have saved 71,370 human lives, while the financial saving to the Government of the United States in keeping the American forces well and fit for duty is estimated at more than \$39,000,000.

But to the far-seeing mind of Gorgas, the great significance of these two factors, immediately important as they were, lay in the fact that even in the Canal Zone, for centuries reputed to be one of the world's worst pest-holes, yellow fever had been completely crushed and malaria placed in subjection; and that it had beyond all doubt been demonstrated that tropical diseases could be prevented or controlled, and that it lay within the reach of governments to assure the health and prosperity of the vast tropical lands in Central and South America, by the application of sanitary methods such as he had used at Havana and at Panama.

EXTERMINATING DISEASE THE WORLD OVER

The story of the life of Gorgas reveals how step by step each achievement led him on to a greater one. Following up his triumph at Havana he made an even greater conquest of disease

at Panama. This accomplished, he advanced to the problem of extirpating yellow fever everywhere. Nor were his activities confined to this object. His reputation was world-wide, and he had become an international figure. While still Chief Sanitary Officer at Panama, he was invited to advise and assist various countries and their governments in matters of sanitation. In 1913, at the request of the Chamber of Mines of Johannesburg, he went to South Africa to investigate the cause of the high pneumonia rate in the Witswatersrand mines; and it was there that he received notice that he had been made Surgeon-General of the United States Army. In 1912 and 1913, on the request of the Ecuadorean Government, and again in 1916, as a member of the Commission of the International Health Board of the Rockefeller Foundation, he conducted the campaign against yellow fever in Ecuador.

As Surgeon-General of the Army, when the United States entered the World War, Gorgas had direct charge of the health of all our troops, and it thus fell to him to organize the Medical Department of the Army into a body that could efficiently care for the health of more than four million men. To this end he associated with him men of prominence in the medical profession throughout the United States, and with their co-operation there was created the splendid medical organization which cared for our sick and wounded in France, as well as for the recruits in the training camps in the United States.

He retired from the Army in 1918; and he then associated himself with the International Health Board of the Rockefeller Foundation to take charge of the yellow fever work, and prosecute his plan for the complete extinction of that disease.

A CITIZEN OF THE WORLD

Gorgas died in London on July 4, 1920, in the midst of his labors, while on the way to the West Coast of Africa. The King of England had expressed a desire to grant him a decoration in recognition of his great work, and hearing of his illness came personally to his bedside and there bestowed upon him the Cross and Star of Knight Commander of the Order of St. Michael and St. George.

Other nations had previously paid him their tributes. France had made him Commander of the Legion of Honor, and the King of Italy had awarded him the Grand Cross of the Order of the Crown of Italy. He was also the recipient of honors from leading universities, both at home and abroad, holding some eight degrees of Doctor of Science and five of Doctor of Laws. He was furthermore awarded, because of his particularly eminent services to humanity, a number of special medals, includ-

ing the Mary Kindsley Medal of the Liverpool School of Tropical Medicine, the medal of the National Academy of Sciences, the Damson Medal of the University of the South, the Buchanan Medal of the Royal Sanitary Institute, London, and the Harbin Medal of the Royal Institute of Public Health, London.

But Gorgas is not to be remembered for his scientific accomplishments alone. As a man, he equally commands our admiration and respect. A quiet and modest demeanor attested his unassuming greatness, while his ever-ready kindness bespoke the warmth of his human sympathy.

Newton D. Baker, former Secretary of War, well expressed the sentiment of many when he said that it was appropriate that Gorgas should die on foreign soil, for he had truly become a citizen of the world.

FUNCTION OF THE MEMORIAL INSTITUTE

Gorgas's life-work is not of the kind that can perish. Its results are destined to endure and to grow. It rests with men and women of humane and generous impulses, of imagination and vision, in all climes, to see to it that this is so. In the Gorgas Memorial Institute of Tropical and Preventive Medicine we see a noble and confident initiative, reassuring and full of promise. Its benefits are to be extended to all countries. Through President Porras, the Republic of Panama, in testimony of its gratitude, has offered the funds for a building and necessary equipment. The Institute has already been incorporated in the United States, under the laws of the State of Delaware, the incorporators being: President, Rear Admiral W. C. Braisted, Surgeon-General, U. S. Navy [Ret.]; vice-president, Dr. Franklin H. Martin, Director General American College of Surgeons; directors, Dr. Belisario Porras, President of the Republic of Panama, founder; Dr. A. S. Boyd, Chief of Surgical Service, Santo Tomas Hospital, Panama; Dr. Frank Billings, Secretary Board of Trustees, American Medical Association; Surgeon-General Hugh S. Cumming, U. S. Public Health Service; Dr. Oscar Dowling, Health Officer of the State of Louisiana; Dr. Seale Harris, President of the Southern Medical Association; Surgeon-General Merritt W. Ireland, U. S. Army; the Hon. John Bassett Moore, Judge of the Permanent Court of International Justice; Dr. Leo S. Rowe, Director General of the Pan-American Union; Surgeon-General Edward R. Stitt, U. S. Navy; Dr. E. J. Williams, Health Officer of the State of Virginia.

The Board of Directors has chosen Dr. Richard P. Strong as Scientific Director.

The Advisory Board, of which Secretary of State Charles

Evans Hughes is a member, consists of the diplomatic representatives of practically all the Central and South American countries affected by tropical diseases, as well as of a number of eminent physicians and surgeons, and of health officers of the United States acting as committees of the leading medical, surgical and public-health associations.

Through the completion by the Government at Panama, at a cost of \$2,000,000, of the new Santo Tomas Hospital, adjoining the site of the Gorgas Memorial Institute, excellent laboratory facilities will be provided for the beginning of the international work in the very near future, without awaiting the erection of the Institute's own building. We have heretofore mentioned the generous offer by the University of Alabama of the use of one of its buildings for the Gorgas School of Sanitation at Tuscaloosa. With the raising of the endowment fund required for the maintenance of the Gorgas Memorial Institute and its branches, the work will proceed in its entirety, and it is expected that the autumn of 1922 will find most of it in progress.

The importance, both scientific and practical, of the work thus to be undertaken, is universally recognized. The Medical Corps of the United States Army and Navy and the United States Public Health Service have given assurance of their active participation and co-operation. Harvard and other leading universities of the United States interested in the prevention of tropical diseases have expressed a desire to send representatives to aid in research and in the practical application of the scientific principles established. Secretary of State Hughes, in his acceptance of a place on the Advisory Board, expressed the belief that the fulfilment of the Institute's great design would materially assist in cementing the friendship of our sister republics. Conceived in the faith that the work to which Gorgas devoted his life is not for a day, but for all time, the Gorgas Memorial Institute of Tropical and Preventive Medicine has accepted as a sacred trust the task of following the trail which he blazoned, its motto being—"health to all people, in all lands."

THE QUESTION OF ADVISORY OPINIONS¹

NO subject connected with the organization of the Permanent Court of International Justice has caused so much confusion and proved to be so baffling as the question whether and under what conditions the court shall undertake to give "advisory" opinions.

This state of doubt and uncertainty may in large measure be ascribed to the nature of the proposal.

A court of justice, whether national or international, is essentially a judicial body, whose function it is to end disputes by deciding them. The maintenance of the character, reputation, and usefulness of such a court is inextricably bound up with the obligatory force and the effective performance of its decisions or judgments. The advisory function, as between private parties, is appropriately exercised by private counsel, and, in the case of governments, by tribunals or law officers duly established for the purpose.

It is evident that, to impose upon a court of justice the duty of giving advice, which those requesting it were wholly at liberty to reject, would reduce the court to a position inferior to that of a tribunal of conciliation, which, although it might not compel the parties to accept a particular suggestion, would presumptively be endowed with power to bind them to respect and to carry out a solution to which they had once formally agreed.

What has been said is especially true of the Permanent Court of International Justice, whose establishment was inspired by the design to cultivate and to enlarge the application between nations of the principle and method of judicial decision. It is hardly compatible with this design that the court should be obliged to render on request opinions lacking any element of authority or of finality. But it is by no means clear that such an obligation has been imposed on the court.

The definition of the powers and functions of the court is found in the statute unanimously passed by the Assembly of the League of Nations on December 13, 1920. It will, however, be observed that this statute, which is the court's charter or

1. Memorandum by Mr. Moore, February 18, 1922 (Dist. 44). *Congressional Record*, 69th Cong., 1st Sess., LXVII, part 2 (January 4, 1926), 1427-1431.

constitution, is not merely the act of the assembly. On the contrary, it was submitted to all the members of the league for their ratification, and it has come into force by virtue of its ratification by a majority of such members. It is an international act of the highest authority.

This fundamental act, under which the court has been organized, not only does not in terms impose on the court an obligation to give advisory opinions but it contains no specific provision on the subject. It has, however, been suggested that such an obligation may be inferred from certain general references made in the statute to article 14 of the covenant, in which alone is the subject of "advisory opinions" mentioned. This renders it important to examine, in the first instance, the provisions of that article.

Article 14 of the covenant reads as follows :

The council shall formulate and submit to the members of the league for adoption plans for the establishment of a permanent court of international justice. The court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The court may also give an advisory opinion upon any dispute or question referred to it by the council or by the assembly.

It will be seen that the English and the French text of article 14 do not precisely correspond. According to the testimony of various participants, the English text seems to have been that first presented. If this be so, the translation into French bears marks of haste. But whether the French text is a faulty version of the English or whether the English text is a faulty version of the French are questions of perhaps minor importance. The fact is that, in the English text the language of obligation is altogether lacking, while in the French text the words appear to be open to interpretation.

The French version says that the court "*donnera*"—"shall" or "will"—give advisory opinions. Had the words been "*elle devra donner*," the idea of a positive obligation or duty would have been unquestionably conveyed. It seems that the word actually employed may be interpreted more liberally.

On the other hand, the English text says "may," the precise French equivalent of which is "*peut*." The word "may" is permissive, importing discretion, and leaving to the court itself the sole power to determine in each instance whether, and in what circumstances, and on what conditions, it would undertake to give advice.

The treaty of Versailles, in which the covenant was interpreted, declares (Art. 440) that "the French and English texts

are both authentic" (*les textes français et anglais feront foi*). Assuming, then, that while the English text uses the permissive "may," the word "*donnera*," in the French text, should be interpreted as having the compulsive force of the phrase "*devra donner*," we should have the case of two conflicting texts. In such a predicament, in considering the question whether the court is subject to a peremptory duty to discharge a function admittedly inconsistent with and potentially destructive of the judicial character with which the court has undoubtedly been invested, is it unreasonable to hold that the obligation to perform such a function can not be deducted from two contradictory texts, both of which are official?

Express references to Article 14 of the covenant are made in the statute, (1) in the title, which reads: "Statute for the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations"; and (2) in Article 1, which speaks of the court as having been "established in accordance with Article 14 of the covenant." The resolution of the assembly, by which the statute was passed, also mentions the draft of the statute as having been "prepared by the council under Article 14 of the covenant." These references seem to be designed merely to recite the fact that the council had performed its duty, under Article 14 of the covenant, to "formulate and submit" a plan or plans "for the establishment of a permanent court of international justice."

Moreover, it was in view of the stipulation that the plan should be so submitted that the assembly in its resolution expressly required the council to submit the statute to the members of the league "for adoption in the form of a protocol duly ratified and declaring their recognition" of it. There is evidently nothing in these references to indicate the extent to which the statute had gone in defining the jurisdiction of the court.

The jurisdiction of the court is defined by Article 36 of the statute. Of this article only the first paragraph and the last are pertinent to the present question. The first reads: "The jurisdiction of the court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force"; the last reads: "In the event of a dispute as to whether the court has jurisdiction, the matter shall be settled by the decision of the court."

It will be observed that the French text of the first paragraph speaks of the jurisdiction of the court as comprising all "matters" (*affaires*) which the parties refer to it and all "cases" (*cas*) specially provided for in treaties and conventions in force. All the rest of the article, constituting by far

the major part of it, deals with the compulsory jurisdiction which the parties to the statute are at liberty to accept.

Taking the context as a whole, Article 36 treats, certainly in the main, of the exercise by the court of its judicial functions. The phrase "cases which the parties refer to it" obviously contemplated only disputes between governments, and, unless the phrase "all matters provided for in treaties and conventions in force" is subject to the same or to a similar limitation, the court conceivably might be required to act as a board of conciliation, as a mediatorial body, or as an agency for the exercise of good offices. In such event the court would, under the last paragraph of the article, itself determine the question of its jurisdiction.

In view of the importance of the subject, we may, for the purpose of obtaining all possible light, examine the history of the article.

In the draft of the advisory committee the jurisdiction (*compétence*) of the court was defined by an article numbered 34, the subject of "advisory opinions" being dealt with in a separate article, numbered 36. Article 36 of the statute takes the place of Article 34 of the draft.

By Article 34 of the advisory committee's draft it was provided that the court should have jurisdiction (*compétence*)—

1. To "hear and determine," without any special convention, cases of a "legal nature" (*ordre juridique*) falling within certain specified categories.

2. To take cognizance of "all disputes (*différends*) of any kind" submitted to it "by a general or particular convention between the parties."

3. To decide any "dispute" (*contestation*) as to whether a certain case came within the court's jurisdiction as thus defined.

This article, it will be seen, related solely to the competence of the court judicially to determine international disputes.

The draft statute came before the council at San Sebastian on August 5, 1920, with a report presented by M. Léon Bourgeois. This report recommended that the draft be sent to all members of the league. The council adopted this recommendation and instructed M. Léon Bourgeois to prepare a preliminary report which might serve as a basis for the council's final opinion.

The report of M. Léon Bourgeois, presented to the council at Brussels on October 27, 1920, dealt at length with Article 34 of the draft. In this relation the report remarks:

No difficulty arises when there exists between the parties a general or special convention declaring the court to be competent. But it

remains to be decided whether we can set up a court of justice entitled to consider itself competent to give a decision where no special convention exists.

Throughout the discussion Article 34 is treated as relating exclusively to the judicial determination of international disputes, and the report concluded with a proposal that, in place of Articles 33 and 34 of the draft, there should be an article—Article 33—declaring that “the competence of the court shall be governed by Articles 12, 13, and 14 of the covenant,” and that, in place of Article 34, there should be an article, with a corresponding number, declaring that—

ART. 34. Without prejudice to the freedom given by Article 12 of the covenant to the parties in a dispute to submit it either to judicial procedure or arbitration or to the consideration of the council, the court shall, without a special agreement, deal with disputes whose settlement is intrusted to it or to the court established by the League of Nations under the terms of the treaties now in force.²

This was intended to meet the view that the advisory committee had exceeded its mandate in attempting (1) to create a compulsory jurisdiction, and (2) to take from members of the league the right to go to the council instead of to an arbitral or a judicial tribunal.

In the advisory committee's draft, as amended by the council in conformity with M. Léon Bourgeois's report, Articles 33 and 34 read :

ART. 33. The jurisdiction of the court is defined by Articles 12, 13, and 14 of the covenant.

ART. 34. Without prejudice to the right of the parties, according to Article 12 of the covenant, to submit disputes between them either to judicial settlement or arbitration or to inquiry by the council, the court shall have jurisdiction (and this without any special agreement giving it jurisdiction) to hear and determine disputes, the settlement of which is by treaties in force intrusted to it or to the tribunal instituted by the League of Nations.³

The discussion of the foregoing articles was taken up by the subcommittee on December 1, 1920.⁴

In connection with the draft articles the chairman, M. Hagerup, read an Argentine proposal to make obligatory the submission to the Permanent Court of Arbitration or to the Permanent Court of International Justice of all international disputes which could not be settled by diplomacy, except those that affected the constitutional systems of the contesting

2. *Official Journal*, No. 8 (November–December, 1920), p. 15.

3. *Records of the First Assembly; Meetings of the Committees*, I, 438.

4. *Idem*, p. 380.

states⁵; a Colombian proposal that the text of the advisory committee's draft should be retained⁶; an Italian proposal to make the submission dependent upon the agreement of the parties "to settle the dispute by judicial means"⁷; and a Panaman proposal to make submission, after certain preliminaries, obligatory within the limits of the advisory committee's Article 34.

The chairman of the subcommittee, M. Hagerup, read a new wording of Articles 32-34, submitted by M. Fromageot, Sir Cecil Hurst, and M. Ricci Busatti, reading, as to Articles 33 and 34:

ART. 33. The jurisdiction of the court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force.

ART. 34. When a treaty or convention in force provides for the reference of a matter to a tribunal to be instituted by the League of Nations the court will be such tribunal.

M. Fernandes (Brazil) asked whether, according to this formula, "the court would not also have jurisdiction in non-judicial questions which the parties might choose to submit to it."

The chairman and M. Fromageot answered in the affirmative, M. Fromageot remarking "that most questions had a political aspect, and the chairman pointing out that the new text only expressed in a clear way what was already contained in the earlier draft."

M. Fromageot "explained that the new text of Article 34 mainly reproduced the provisions of the old one," and added: "However, it took into account all the cases which, under the peace treaties, were to be referred to the "jurisdiction instituted by the League of Nations."⁸

As the result of its deliberations the subcommittee presented to the committee a draft article which, with slight modifications by the committee, now forms Article 36 of the statute; and with this they also presented the draft of Article 37, which provides that "when a treaty or convention in force provides for the reference of a matter to a tribunal to be instituted by the League of Nations the court will be such tribunal."

On these articles the third committee made to the assembly the following report:

Articles 36 and 37 (Brussels, Arts. 33 and 34). The subcommittee has had before it several amendments tending to extend more or

5. *Idem*, p. 514.

6. *Idem*, p. 525.

7. *Idem*, p. 498.

8. *Idem*, p. 382.

less the sphere of compulsory jurisdiction and the right of the parties to proceed by way of unilateral arraignment. The subcommittee has decided that it could not adopt these amendments and that it should rather maintain the principles enunciated on this point in the council's draft. Whatever differences of opinion there may be on the interpretation of the covenant with regard to the acceptance of a compulsory jurisdiction within the scope of its provisions and upon the political expediency of adopting an unconditionally compulsory jurisdiction in international relations, the subcommittee was unable to go beyond the consideration that unanimity on the part of the members of the League of Nations is necessary for the establishment of the court, and that it does not seem possible to arrive at unanimity except on the basis of the principles laid down in the council's draft.

With regard to the terms in which the council has formulated these principles, the subcommittee considered that the rule governing the jurisdiction of the court would gain by a slightly different expression. The text adopted by the subcommittee aims at formulating as clearly as possible the following ideas:

1. The jurisdiction of the court is in principle based upon an agreement between the parties. This agreement may be in the form of a special convention submitting a given case to the court or of a treaty or general convention embracing a group of matters of a certain nature.

2. With regard to the right of unilateral arraignment contemplated in the words "and this without any special agreement giving it jurisdiction" in the council's draft, the subcommittee, by deleting these words, has not changed the meaning of the draft. In conformity with the council's proposal, the text prepared by the subcommittee admits this right only when it is based on an agreement between the parties. In the subcommittee's opinion, the question must be settled in the following manner: If a convention establishes, without any reservation, obligatory jurisdiction for certain cases or for certain questions (as is done in certain general arbitration treaties and in certain clauses of the treaties of peace dealing with the rights of minorities, labor, etc.), each of the parties has, by virtue of such a treaty, the right to have recourse without special agreement (*compromis*) to the tribunal agreed upon. On the other hand, if the general convention is subject to certain reservations ("vital interests," "independence," "honor," etc.), the question whether any of these are involved in the terms of the treaty being for the parties themselves to decide, the parties can not have recourse to the international tribunal without a preliminary agreement (*compromis*).

3. Finally, the subcommittee thought that it should establish

the rule that when a treaty or a convention provides for reference to a tribunal to be established by the League of Nations, the court established by the present draft shall be that tribunal. This provision will have a practical application, particularly in the cases mentioned in the treaties of peace for submission to an international tribunal. It does not include existing conventions which refer certain disputes either to a court of arbitration generally or to the Permanent Court of Arbitration of The Hague. To substitute the new Court of International Justice for these courts of arbitration would require a special agreement.⁹

In the assembly the discussion of the draft of the statute was brief and was general in character, and related chiefly to the principle of compulsory jurisdiction, of which most of the speakers appeared to be advocates. In answer, however, to complaints that the draft did not advance the application of that principle, M. Hagerup, who had been chairman of the subcommittee, drew attention to Article 36, and, after reading the first paragraph, pointed out that a certain number of general conventions already provided for compulsory arbitration. In the same relation he also called attention to Article 37 of the draft.

The subject of "advisory opinions" was not mentioned in the debate. It was, however, discussed in committee, and the perplexity caused by it is fully exemplified in the reports of the discussions to which the proposals on the subject gave rise.

The subject was first discussed by the advisory committee of jurists at The Hague in June-July, 1920, in connection with an article which, in the first draft of the statute, was numbered 32, but which was later changed to 36. This article reads as follows:

ART. 36. The court shall give an advisory opinion upon any question or dispute of an international nature referred to it by the council or assembly.

When the court shall give an opinion on a question of an international nature which does not refer to any dispute that may have arisen, it shall appoint a special commission of from three to five members.

When it shall give an opinion upon a question which forms the subject of an existing dispute, it shall do so under the same conditions as if the case had been actually submitted to it for decision.

When this article was taken up for discussion, M. de Lapradelle explained its meaning by stating that it was based on the difference between a "dispute" (*différend*) and a "point" (*point*) submitted for an advisory opinion; that while a dis-

9. *Records of the First Assembly; Plenary Meetings*, pp. 462-463.

pute was an actual contest (*conflict actuel*), a point was rather a theoretical question; that this difference made it necessary to follow different methods in the two cases; and that while a "point" might be considered by a limited number of judges, a "dispute" should be dealt with by a procedure resembling that which must be followed for the rendering of a judgment.

Mr. Root thereupon declared that he was "opposed to the court's having the right to give an advisory opinion with reference to an existing dispute. In his opinion this was a violation of all juridical principles."

According to the record of the proceedings, M. de Lapradelle, in reply, called Mr. Root's attention

to the provisions of Article 13 of the covenant and to the right of the council to send to the court any case which had been submitted to it but which ought to have been settled by judicial means; in such circumstances the court must adopt a procedure similar to that of an actual trial.

Mr. Root is reported to have said that "he was convinced by these arguments."

To a certain extent the record of the discussions is evidently imperfect, since Article 13 of the covenant contains no provision whatever on the subject then under discussion. No doubt M. de Lapradelle referred to Article 14. Nevertheless the provisions of this article are not reproduced, but are only to some extent perhaps conjecturally interpreted in the meager report of his remarks.¹⁰

When the advisory committee came to vote on Article 36 only a "short discussion" took place, and the Italian member, M. Ricci-Busatti, declined to vote, on the ground that "he had not had sufficient time to consider the provisions of the article, which he felt had never been discussed thoroughly."¹¹

The comment of M. Ricci-Busatti, judged by what elsewhere appears, seems to be supported by what is found in the report accompanying the draft of the advisory committee. In this report, after an explanation that it would rest with the council or the assembly, as the case might be, to "adopt" or to "deduce the consequences" of an advisory opinion, it is argued that if the opinion should relate to a theoretical question and not to an existing dispute, then, as the same question might later be brought before the court in its judicial capacity, the court, when giving advice, must be so constituted that the opinion given on the theoretical question would not afterwards affect its freedom of judicial decision; and that, "in order to avoid

10. *Advisory Committee of Jurists*, II, 584-585.

11. *Idem*, p. 649.

the possibility of the court being forced to contradict or repeat itself, it must be differently constituted, and consequently reduced, for the performance of this function, to a smaller number, say, from three to five of its members, as may be decided in the rules of the court." On the other hand, the report, assuming the "dispute" referred to the court by the council or the assembly to have the character of an actual litigation, supposed that the case was one of a legal nature, which the council or the assembly, after ineffectually trying to adjust it in a conciliatory way, should send to the court for advice. In this predicament the report declares that the court's advice (*avis*) "would not have the force of a sentence," but that the "decision" (*décision*) of the court would nevertheless have "the moral force attaching to all its decisions (*arrêts*); and if the council or assembly adopt it, it would have the same wholesome effect on public opinion."

Without commenting at length upon the apparent but unexplained assimilation in the foregoing passage of the distinct and somewhat opposite conceptions of advice and decision, it suffices to remark that the report, although it assumes that an advisory opinion, "if the council or assembly adopt it," would have a wholesome effect on public opinion, does not conjecture what effect the rejection of the court's advice might have either on public opinion or on the court itself. Nor is any reason given for the supposition that an advisory opinion of the court, whether accepted or rejected, would have the "moral force attaching to all its decisions."

Human experience, especially as exemplified in legislation, justifies the belief that the moral authority of judicial decisions is derived chiefly from the fact that they have the authority of law and legally bind the parties to the dispute. If deprived of this effect, their so-called moral authority would promptly vanish.

Nor should we overlook, when considering the question of "moral authority," the tendency of courts, like other bodies of men, to divide in opinion. There is no reason to suppose that the Permanent Court of International Justice, composed of judges reared in different lands and trained under different systems of law, will be free from this human tendency. The framers of the statute therefore provided, when regulating the judicial functions of the court, not only that the vote of a majority should suffice for a decision, thus following the usual rule, but also that individual judges might file dissenting opinions. This, it was felt, might safely be done when the court came to render its judgments. But in the case of an "advisory opinion," which there should confessedly be no obligation to accept, the "moral

authority" of a vote of six to five might not prove to be either convincing or conspicuously weighty.

At its eighth meeting, held at San Sebastian July 30–August 5, 1920, the council (1) decided to send the advisory committee's draft to all the members of the league, and (2) instructed M. Léon Bourgeois to prepare a preliminary report on it as the basis of the council's opinion.¹²

M. Léon Bourgeois presented his report to the council at Brussels on October 27, 1920. The report does not mention Article 36, but it contains a passage not altogether irrelevant to the question of advisory opinions. This passage, which treats of the relations between the court and the league, reads as follows:

V. Relations between the court and the League of Nations.

The question has been raised whether the League of Nations as such or its organizations should be allowed to plead before the court in order to present conclusions or to lay stress upon certain points of view which might appear to them to be in conformity with the general interest.

The essential principle which must be safeguarded is that of the respective independence of the judicial powers represented by the court and of the international power represented by the Council of the League of Nations. Each of those two powers has its own domain. The powers of the council and of the assembly are such that they extend to the transformation of the composition of the court itself, but when they have fully exercised their rights by establishing international jurisdiction under conditions determined by them it is important for them to allow the latter independence in its judgments. We will thus answer in the negative the question which was put to us on this point.¹³

The report of M. Léon Bourgeois was adopted by the council at Brussels, and Article 36 of the advisory committee's draft became known in the subsequent discussions as "Brussels Article 36."

When the draft was presented to the assembly it was referred to the third committee, of which the chairman was M. Léon Bourgeois, and the reporter, M. Hagerup.¹⁴

By the committee the draft was in turn referred for examination to a subcommittee composed of 10 of the committee's members, including 5 who had served on The Hague committee (the advisory committee of jurists).

Before the subcommittee there were two proposed amend-

12. *Official Journal*, No. 6 (September, 1920), p. 321.

13. Extract from report presented by M. Léon Bourgeois to the council at Brussels, October 27, 1920; see Minutes of the Council, *Official Journal*, No. 8 (November–December, 1920), p. 12.

14. *Records of the First Assembly; Plenary Meetings*, pp. 436, 437.

ments of Article 36, one submitted by the Italian Government, the other by the Argentine delegation.

The proposal of the Italian Government was embraced in a report of the council for diplomatic litigation (*Consiglio del contenzioso diplomatico*) attached to the ministry of foreign affairs. The proposal reads as follows:

Art. 36. The last paragraph of this article attributes to the functions and the opinion of the court a character scarcely in conformity with the object aimed at in the provisions of Article 14 of the covenant, to which this article relates. The council therefore suggests the deletion of this paragraph. If this provision, as it seems, refers to the power of the council and the assembly to send the parties, should the occasion arise, *ex officio* before the court, more exact and definite rules should be formulated to this effect. The second paragraph of this article should be modified in such a way as only to confer the power of constituting special committees for these advisory duties imposed upon the court by Article 14 of the covenant.¹⁵

In explanation of this proposal it may be recalled that the last paragraph of Article 36 provided that when the court should give an advisory opinion on an existing dispute it should do so "under the same conditions as if the case had been actually submitted to it for decision"; and that the second paragraph provided that the court, in giving an opinion on a theoretical question, should discharge its functions through a committee of from three to five members.

The Argentine proposal was to amend the first paragraph of the article by requiring the court to give advisory opinions not only on questions or disputes referred to it by the council or the assembly but also on questions or disputes referred to it by the "Governments of the States composing the League of Nations."

In the Italian proposal the point of capital importance appears to be the fact that the proposal treats the provisions of Article 36 of the draft as going beyond the stipulations of Article 14 of the covenant.

In the report of the discussions in the subcommittee it appears that when Article 36 was taken up the chairman, M. Hagerup, gave as an example of the possible reference of questions relating to an existing dispute the Aaland Islands case, and said: "Had the court existed when it arose, the questions now referred to the committee of jurists would have been submitted to it and would have been dealt with according to the usual procedure for hearing and determining cases judicially."

M. Huber, now a member of the court, is reported to have "thought that this might have been possible in the case men-

15. *Records of the First Assembly; Meetings of the Committees*, I, 499.

tioned by the chairman, since the points referred to the jurists were, respectively, of an interlocutory or theoretical nature," but that "had they affected the actual conflict the same procedure might have proved dangerous."

The chairman read a proposed amendment, submitted by M. Fernandes (Brazil), as follows:

"When it shall give an opinion upon a question which forms the subject of an existing dispute, it must assemble the quorum required for ordinary judgments."

Sir Cecil Hurst stated that for practical reasons he shared the opinion of M. Huber and significantly inquired, "Was it probable that parties to a dispute would take the trouble to appear before the court in order to enable it to give an advisory opinion? On the other hand, if they did so, why should not this opinion be binding on them?"

In connection with this observation of Sir Cecil Hurst, it is instructive to adduce the example of the judicial committee of the Privy Council in England, whose conclusions, although nominally given in the form of advice, have in practice the force and effect of judicial judgments. Nor is this conception of an advisory opinion altogether exceptional in jurisprudence. In the Roman law, for instance, the "consultation" of the juriconsults (*responsa prudentium*) had during certain periods an official authority which bound the judge.¹⁶

Mr. Ricci-Busatti, continuing the discussion, thought that in practice it would be impossible for the court to draw a distinction between the cases contemplated in the second and third paragraphs of Article 36, and that the question submitted to the court "would never be identical with the dispute before the council, but more theoretical and generalized."

The chairman, as also Mm. Adatci (Japan) and Fernandes, supported the Italian amendment; M. Fromageot was also in favor of it, except with regard to the right of the court to constitute a commission of inquiry. It was, he said, "to be regretted that the covenant gave the court advisory capacities, but since this was so it should be fully responsible for its opinions."

Referring to the question whether, in giving an advisory opinion, the whole court must act, Sir Cecil Hurst expressed the view "that cases might arise where the full court could not deal at once with disputes submitted to it," and that "it might then be advantageous to refer the matter to a smaller body."

The chairman at this point put the article to a vote, paragraph by paragraph, with the following result:

16. *Nouveau Larousse*, III, 226, verb. *Consultation*.

First paragraph. The Argentine amendment was rejected.

Second paragraph. The Italian amendment was by a vote of 7 to 2 adopted, subject to its future wording.

Third paragraph. Deleted by a vote of 6 to 3.¹⁷

When the consideration of the article as thus amended was resumed, M. Fromageot presented a new wording, which the committee had formulated as follows:

"Any question or dispute submitted to the court by the assembly or by the council for its opinion may be referred by the court to a special commission composed of members of the court for the preparation of such opinion."

But in presenting this wording M. Fromageot stated that the committee had been unanimous in thinking that the entire article should be suppressed. He then added this remark: "In reality, the covenant in Article 14 contained a provision in accordance with which the court could not refuse to give advisory opinions. It was therefore unnecessary to include a rule to the same effect in the constitution of the court."

In making this remark M. Fromageot may have had in mind only the French text of Article 14, or he may have intended only to convey the opinion that the court would not be justified in taking the position that it would never in any case, in any circumstances or on any conditions, render an advisory opinion. The latter interpretation would be in harmony with what, as has heretofore been pointed out, he said on a previous occasion when he spoke of the covenant not as having imposed on the court an obligation to render advisory opinions on request, but as giving the court "*le pouvoir*" or capacity to render such opinions.

Continuing the discussion on Article 36, M. Ricci-Busatti drew attention to the proposal in a note from the labor office to give the labor organization the same right to ask for advisory opinions as was enjoyed in virtue of the covenant by the council and the assembly.

M. Loder, now president of the court, did not think that Article 36 covered merely the same ground as Article 14 of the covenant. He recalled the distinction established by the former between disputes which had actually arisen and theoretical questions.

The chairman seconded the proposal to strike out Article 36, and after a further remark by M. Fromageot to the effect that "the question of the conditions under which the court could give opinions was scarcely included in that of the organization of the court" a vote was taken, with the result, as the record

17. *Records of the First Assembly; Meetings of the Committees*, I, 386-387.

states, "that the suppression of Article 36 was unanimously decided upon."¹⁸

Thus at the end of six months devoted to the drafting of the statute the attempt to solve the question of advisory opinions was abandoned.

The committee in its report to the assembly gave of its action the following explanation:

Brussels Art. 36. Article 14 of the covenant provides that the assembly and the council may ask the court for advisory opinions. The subcommittee considers that these opinions should in every case be given with the same quorum of judges as that required for the decision of disputes, and that there is no need to maintain the distinction established in this respect by the draft scheme between the cases where a question submitted to the court is the subject of a dispute which has actually arisen and where there is no existing dispute. This distinction seemed lacking in clearness and likely to give rise to practical difficulties. The subcommittee was further of the opinion that the draft here entered into details which concerned rather the rates of procedure of the court.

Accordingly, the subcommittee propose that this article should be suppressed.

Certain proposals to give either to the governments or to the international labor office the right of asking the court for advisory opinions have not been adopted by the subcommittee, which considers that such provisions would involve a considerable extension of the duties of the members of the court and might lead to consequences difficult to calculate in advance.¹⁹

In the committee's report there is also another passage materially bearing on the question of advisory opinions. This passage relates to an Argentine proposal to amend Article 38 of the statute (*Brussels Art. 35*) by providing that the decisions of the court should not have the character of precedents. The committee rejected this proposal, because, says the report, it was considered to be "one of the court's important tasks to contribute, through its jurisprudence, to the development of international law."²⁰

It is hardly compatible with this design that the court should be required to give opinions having no obligatory character.

On the strength of the foregoing review, the following propositions may be submitted for consideration:

1. That the constitution of the Permanent Court of International Justice contains no express provision on advisory

18. *The Records of the First Assembly; Meetings of the Committees, I*, 401.

19. *Records of the First Assembly; Plenary Meetings*, p. 464.

20. *Idem*, p. 463.

opinions, an article to regulate the giving of such opinions having been deliberately rejected.

2. That, on consideration of the two official texts, Article 14 of the covenant, where alone the subject is mentioned, can not be regarded as imposing on the court an obligation to render such opinions unconditionally and on request.

3. That the giving of advisory opinions, in the sense of opinions having no obligatory character, either on actual disputes or on theoretical questions is not an appropriate function of a court of justice.

4. That the exercise of such a function is at variance with the fundamental design of the Permanent Court of International Justice, which was to advance the application between nations of the principle and method of judicial decision.

5. That the emission, either on actual disputes or on theoretical questions, of opinions avowedly having no binding force, would tend not only to obscure but also to change the character of the court.

6. That the emission of such opinions would necessarily diminish the opportunities for the exercise by the court of its judicial functions, since, if the opinions were treated by the court as binding upon it, they would tend to preclude the subsequent submission of disputes for judicial decision, while if treated as mere utterances and freely discarded they would inevitably bring the court into disrepute.

7. That the emission of such opinions would, for the same reasons, also tend to prevent the court from performing what had been conceived to be one of its primary functions—that of contributing through its jurisprudence to the development of international law.

8. That the rendering of such opinions would, so far as concerns the views or interests of particular nations, involve all the possibilities of prejudice which led to the insertion in the statute of the clause providing for the intervention of governments in pending litigation.

9. That it is not desirable that the court should seem to invite requests or applications for “advisory opinions.”

10. That, taking into account the various phases of the subject, it may be preferable that there should be no special regulation concerning advisory opinions, but that if an application for such an opinion should be presented, the court should then deal with the application according to what should be found to be the nature and the merits of the case.

GARB OF THE WORLD COURT¹

CONFLICTING reports have been published as to the robes to be worn by The Hague World Court. One story was that the judges would wear black velvet robes, lined with black silk, with collars trimmed with ermine, and also that they would wear black velvet birettas like those worn by the judges of the French courts. In a personal letter, published in Law Notes, the Hon. John B. Moore, the American member of that court, states the matter of garb authoritatively. He says:

I am glad to be able to assure you that the statement which you read, to the effect that the Permanent Court of International Justice would "robe its judges in black velvet robes, lined with black silk, with the collars trimmed with ermine," and that the judges would also "wear black velvet birettas, like those worn by the judges of the French courts," is quite inaccurate. The only robe the judges have worn is one of black silk with black velvet facing, which can hardly be distinguished from the academic gown commonly worn in this country. It differs little from the robes worn by the justices of the Supreme Court of the United States, or from those worn by the justices of the higher courts of the state of New York. In fact it is, I think, somewhat simpler than the latter.

The robe, as I have described it, is the only official garb which the Permanent Court of International Justice has authorized or has actually worn. There are no collars and there is no ermine; nor has any kind of headgear—either black velvet birettas or anything else—been authorized or worn by the court. While the reports or suppositions to the contrary may have reflected the inclinations or views of individuals, they are not justified by any resolution or by any act of the court itself. The fact is quite the contrary.

Personally, I should have been content if we had had no official robe at all. I have never been in love even with academic costume. On the other hand, I voted for the robe actually adopted and worn. In so doing, I was moved by the desire not only to render the further discussion of the subject unnecessary, but also to avoid the possibility of any future uncertainty. I have known persons avowedly much opposed to any kind of official dress who not only habitually displayed on their per-

1. Reprinted from the *Ohio Law Reporter*, XX (July, 1922), 201-202.

sons, on every available occasion, all the orders and decorations of which they may have been the recipients, but who would feel no sense of incongruity in ceremonially appearing during the day in a "full-dress" costume regarded in the United States and in certain other countries as being exclusively appropriate to the evening. I can indeed recall certain instances in which persons have subjected themselves to ridicule in this country by appearing during the day in this way, while, in certain other countries, which are regarded as very democratic, I have found that such appearance was expected on formal occasions, without regard to the hour. This may serve to indicate that, in the case of an international body, some plain and uniform article of dress may tend both to simplicity and to the avoidance of shocks to regional conceptions of propriety.

I may say, in conclusion, that the robe adopted by the court is to be worn only on the bench. Outside the court room the judges are altogether at liberty to wear whatever they may individually deem to be appropriate to the occasion.

REPLY TO THE ADDRESS OF H. A. VAN KARNEBEEK, NETHERLANDS MINISTER OF FOREIGN AFFAIRS, AT THE OPENING SESSION OF THE COMMISSION OF JURISTS AT THE PEACE PALACE, THE HAGUE, DECEMBER 11, 1922

AS the representative of the Government which, on behalf of all the Powers by which the present commission was constituted, conveyed to the Government of the Netherlands their common desire that the Commission should meet at The Hague, there has fallen to me the grateful task of responding to the words of welcome which have just been spoken by His Excellency the Minister of Foreign Affairs.

The convocation of this body is one of the results of the International Conference on the Limitation of Armaments, which sat at Washington from November 12, 1921, until February 6, 1922.

The Secretary of State of the United States, in the name of the President, on August 11, 1921, extended to the Governments of France, Great Britain, Italy and Japan an invitation to take part in a conference on the subject of the Limitation of Armament, in connection with which Pacific and Far Eastern questions should also be discussed.

The Government of China was at the same time invited to participate in the discussion of questions relating to the Pacific and the Far East. This invitation obviously was prompted by the consideration that China was a country directly and primarily interested in the solution of those questions; and later, on October 4, 1921, the Governments of Belgium, the Netherlands, and Portugal, in view of their interests in the same quarter, were also invited to take part in "the discussion of Pacific and Far Eastern questions at the conference."

In the invitation extended to France, Great Britain, Italy and Japan on August 11, 1921, to confer on the subject of the limitation of armament, it was stated that, in connection with that subject, it might "also be found advisable to formulate proposals by which in the interest of humanity the use of new agencies of warfare may be suitably controlled."

The Washington Conference did in fact undertake to consider such proposals, but, by reason of the variety and complicated character of the questions relating to the limitation of armament and to the Pacific and the Far East, the conference was able to deal with those proposals only to a limited extent.

On February 6, 1922, a treaty was concluded between the United States, the British Empire, France, Italy and Japan, agreeing to prohibit as between themselves the use of submarines as commerce destroyers, as well as the use in war of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices. The contracting parties further engaged to invite other nations to adhere to these prohibitions, to the end that they might be universally accepted as a part of international law.

Certain proposals also were presented in regard to the use of aircraft, and in regard to the regulation of radio in time of war, but, although these proposals were to some extent discussed, the time proved to be inadequate for their examination.

In these circumstances the United States of America, the British Empire, France, Italy and Japan, the Governments which had been dealing with the subject of the limitation of armament and which had then agreed upon the terms of a treaty for the limitation of their naval armaments, adopted a resolution by which they engaged to constitute a commission, composed of not more than two representatives of each of the contracting Powers, to consider:

1. Whether existing rules of international law adequately cover new methods of attack or defense, resulting from the introduction or development, since The Hague Conference of 1907, of new agencies of warfare, and

2. In case existing rules were found to be inadequate, *what*

changes in existing rules ought to be adopted as a part of the law of nations.

It was provided that the commission might have the assistance and advice of experts in international law and in land, naval and aerial warfare, and that it should report its conclusions to each of the Powers represented in its membership, which were then to confer as to the acceptance of the report and as to the course to be followed to secure the consideration of its recommendations by other Powers.

This was known as Resolution No. 1. At the same time another resolution, known as Resolution No. 2, was adopted, by which it was declared that the Powers, in agreeing to the appointment of the commission, did not intend that it should review or report upon the rules or declarations relating to submarines or the use of noxious gases and chemicals, which had already been adopted in the Conference.

In this preliminary meeting of the members of the Commission and their expert advisers, I have ventured to recapitulate the circumstances of its origin and the objects and limitations of its mandate, in order that these things may be generally understood and that the public may be definitely advised as to the nature and scope of an undertaking in which it is so deeply and so vitally interested.

No explanation is needed of the fact that the parties to the Resolution, under which the Commission of Jurists has been constituted, subsequently extended to the Government of the Netherlands an invitation, which that Government has graciously accepted, to be represented in the membership of the Commission. Not only as the representatives of the nation on whose hospitable soil we are to hold our sessions, but also as representatives of the land of Grotius and of Bynkershoek, a land immemorably associated with the origin, development and improvement of the modern system of international law, it is a pleasure and an inspiration to be assured of the collaboration and aid of the members from the Netherlands in the performance of the responsible task with which the Commission is charged.

The importance of this task will not be gainsaid. It is true that the Commission is not, in a proper sense, to be considered as a diplomatic body by which international agreements are to be formally concluded. Its function is rather that of a committee by which certain subjects are to be examined in order that definite conclusions may be arrived at and reported. In its constitution and its comparatively limited membership, the Commission is well designed for the accomplishment of this purpose. But the fact that its task is essentially prelimi-

nary does not detract from the importance and gravity of its work.

During the past eight years we have constantly been hearing, and we still hear, the despairing declaration that international law no longer exists; while the affirmation that we can ever again be justified in speaking of such a thing as the laws of war is received with a gesture of incredulity.

Such manifestations serve only to indicate the existence of a general distemper which has not yet entirely passed away. But, faith and hope will again revive. The sense of law and of the need of law will again reassert itself. Standing today in the Peace Palace at The Hague, which symbolizes the attainment of peace through the administration of the law between nations and its application to the settlement of their disputes, and recalling the work of the two Hague Conferences of 1899 and 1907, whose acts we are in some measure to reconsider and to supplement, I deem it to be inconceivable that a generation accustomed to boast that it is the heir of all the ages, in the foremost files of time, should consciously relinquish the conception that all human affairs, in war as well as in peace, must be regulated by law, and abandon itself to the desperate conclusion that the sense of self-restraint, which is the consummate product and the essence of civilization, has finally succumbed to the passion for unregulated and indiscriminate violence.

To a counsel of despair so repugnant to the teachings of history and so recreant to the ideals and achievements of the past, the constitution of the present Commission, with a view so to regulate the use of new agencies of warfare as to keep their employment within the bounds of permissible violence set by international law, is the appropriate answer. (*Applause.*)

BOOK REVIEW

WORLD PEACE; or Principles of International Law in Their Application to Efforts for the Preservation of the Peace of the World. *By* FRED D. ALDRICH. Detroit, Fred S. Drake, 1921. 218 pp.

This volume contains a series of lectures delivered before the Detroit College of Law, together with appendices reproducing the text of The Hague Convention for the Pacific Settlement of International Disputes, as renewed in 1907; the Covenant of the League of Nations, and the Statute establishing the Permanent Court of International Justice. Apparently the lectures were not written out beforehand, but were taken down at the time of their delivery by a stenographer unfamiliar with the works which the lecturer quoted; and it is to be inferred that neither the text nor the printer's proofs were afterwards read by the lecturer. Only by such assumptions can we, for instance, account for the citation in various places (pp. 22, 65, 66, 67) of Sir Henry "Mayne," while occasionally we find "Maine"; or for the repeated mention of "Barkley" (pp. 74, 79, 82), while occasionally we find "Barclay" (p. 93), the person no doubt intended being Sir Thomas Barclay, who is, nevertheless, referred to in one place (p. 120) as "Sir Henry Barclay." The author's chief source of authority is the late James C. Carter, whose views he for the most part accepts, although not wholly. The work is characterized not by a comprehensive examination of theoretical discussions or of historical precedents, but rather by the enunciation of the author's conception of what is practicable, especially in the light of manifestations of American sentiment. He takes the ground that the greatest improvement in international relations is to be brought about not by "central control, or the enforcement of penalties," but by the expansion of the powers and the jurisdiction of international courts, by the enlarged use of methods for the delay or suspension of controversy pending investigation of the merits, and above all by some provision to prevent resort to war in cases covered by such phrases as "national honor" and "vital interests." The author speaks of these and various similar phrases as having been "suggested by The Hague Conferences, and by the constitution

of the League of Nations." In reality, it is one of the distinctive merits of the Convention for the Pacific Settlement of International Disputes, concluded at The Hague in 1899 and renewed in 1907, that, while it does not purport to make arbitration compulsory, it excepts nothing from the process. It was in the treaties made early in the present century for the supposed purpose of creating a compulsory submission that exception was made of questions involving "independence," "honor," "vital interests," or the interests of third powers. The author is quite right in maintaining that in this way all matters of real importance were excepted from the obligation.

From what has been stated, the inference will correctly be drawn that the author is not a supporter of the Covenant of the League of Nations, his hopes for the future being centered upon the development of the judicial method of determining international disputes.

Reprinted from the *Columbia Law Review*, XXII (1922), 91-92.

DELAWARE AND THE CONSTITUTION¹

MY remarks this evening are not to be considered as the main object of my presence at the Annual Dinner of the "Sons of Delaware" in Philadelphia, but are rather to be regarded as something incidental and, in an immaterial sense, contributory. When I say in an "immaterial sense," I only mean that, in using the word "contributory," I do not intend to suggest that I interpreted your invitation to be present in the same sense as Liszt is said to have interpreted an invitation to perform on the piano at a dinner at which he was an invited guest. He answered that he could pay for his dinner but would not play for it. Happily, I have not been confronted with such an alternative. When your President asked me to be with you this evening, he said nothing about an address; but, when he subsequently asked for the topic on which I would speak, I answered the inquiry by furnishing the title, just as others are accustomed to do who are subjected to this delicate form of flattery.

When I stated that I would take as my text "Delaware and the Constitution," I intimated that I probably should not speak upon it in the sense the words ordinarily convey. Your Society

1. Address at the Annual Dinner of the "Sons of Delaware" at Philadelphia, December 7, 1923.

has fitly chosen as the date for its annual dinner the day on which Delaware, first among the States of the Union, ratified the Constitution. This event is so well known that the circumstances attending it do not require a fresh recital, and in what I say I shall refer only to what has since taken place.

It would be idle to pretend that the Constitution stands today practically as the Fathers made it. It has been amplified and, in some respects, materially altered by Amendments; and by none of these has it perhaps been more profoundly affected than by the one next the last, the Eighteenth, or Prohibitory Amendment. Far be it from me to introduce this evening any controversial topic. I would not disturb the harmony of the occasion. I would not even recall the evil but comparatively recent days, the recollections of which, though repulsive to some, are still cherished by many. My only object in mentioning the Eighteenth Amendment is to use it as an illustration of the great advance that has been made in the United States toward the centralization of power. In this respect the Amendment is not altogether exceptional, but it represents the farthest step yet taken in bringing within the domain of national control and administration that which had previously been a matter of local regulation.

The other morning I happened to be in a town in which, when the well-disposed inhabitants sought to make their ablutions, they found to their dismay that the waterworks had suddenly ceased to function; and, while we were still in this predicament, an acquaintance gloomily surmised that the cessation of the supply of water might presage the adoption of a supplementary Amendment to cut off that beverage also. While seeking to reassure him by calling his attention to the fact that it was raining, I also suggested that, as the fall was slight, this latest and providential demonstration perhaps was intended to enjoin economy in the use of water. But, as I have intimated, I do not intend to dwell on this subject; and I desire, speaking seriously, emphatically to say that I fully share the opinion so well expressed by President Coolidge in his recent and admirable address to the Congress, that it is the duty of a citizen not only to observe the law but also to let it be known that he is opposed to its violation.

In a celebrated case relating to a question that grew out of the Civil War, the Supreme Court spoke of the United States as "an indestructible Union of indestructible States." These words were uttered at a time when the tendency, which naturally characterized the period of the Civil War, to sweep everything into the vortex of national power, was still running strong. Having lately passed through another war, we find that

the same tendency has again been strengthened and accelerated. In commenting upon it, I do not speak as one who has any anti-national bias. On the contrary, I have always been a strong upholder of the national power within the sphere fixed by the Constitution. But I do not hesitate to affirm that the tendency more and more to bring within the national sphere subjects which, by the Constitution, were matters of local regulation reserved to the several States, is one that must be watched and limited, unless the character of our government and the political conceptions of our people are to be radically changed.

I am not among the number of those whose emotions are pleasurably excited and whose pride is gratified by the attempt to exercise power under grandiose titles. I believe that the future of the country will be determined by the development of character and capacity in the individual citizen; and the efficiency and capacity of citizens in the mass, whether men or women, depends, according to my creed, upon their efficiency and capacity individually; and individual efficiency and capacity in matters of government can be developed only through responsibility and practice.

In a country so vast as ours the transfer to the sphere of national regulation and administration of matters which the Constitution left to the several States necessarily means the growth of a bureaucratic type of government. Such a type of government possesses certain inherent defects, among which may be mentioned a want of intelligence and of sympathy in dealing with local conditions, the development of habits of secrecy in its workings, and the growth of a corresponding tendency towards disrespect for and disregard of the fundamental principles of individual liberty for the conservation of which the Constitution was ordained.

In speaking of individual liberty, I feel obliged to advert to the vital importance of being on our guard against the spirit of intolerance and of proscription which is ever ready to manifest itself, and which never fails insidiously to attack our constitutional structure in time of war, when the public safety may require a temporary abridgement of that measure of individual liberty which is essential to the preservation of free institutions. In time of war restrictions are necessarily practiced, the maintenance of which in time of peace begets a disrespect for law as well as a sullen discontent and an attitude of antagonism toward the orderly processes of government. It should be remembered that the famous judicial utterance that "no man is so high as to be above the law" was, in the particular instance, especially aimed at those in positions of public author-

ity. But it is equally applicable to all classes of the community without regard to rank or power.

Another subject vitally connected with our constitutional structure is that of taxation. It has been well said that the power to tax involves the power to destroy; but destruction is not the proper object of taxation. Probably there are few persons so intensely patriotic as to find the payment of taxes an unalloyed pleasure. It is desirable to increase the number, but this can never be done by an unintelligent and burdensome exercise of the power of taxation in a spirit of partisanship or of extravagance. As the habit of reckless expenditure is demoralizing to individuals, so it is to governments. Economy is one of the main supports of honesty, just as it is the most efficient safeguard against bankruptcy. It is heedful of obligations to others as well as of obligations to oneself. Unnecessary taxation tends directly to demoralize and to undermine the balanced system of government which the Constitution of the United States was designed to assure. At the same time I do not think of taxation as unnecessary which is designed to compel the present generation to discharge a substantial proportion of the obligations into which it has entered. No policy could be more censurable than that of increasing the burdens of the future in order to facilitate the profligacy of the present. Future generations will have their own unforeseen obligations to incur and discharge.

In what I have said I have not undertaken to contrast the present with the past to the advantage or to the disadvantage either of the one or of the other. I do not discern in the times any unprecedented perils, nor is my attitude towards the solution of the problems that exist by any means despondent. On the contrary, I look to the future with hope and with confidence. The questions which confront us today are questions that have to some extent, and in one form or another, confronted the people of the United States from the beginning. But it has been said, and truly said, that perpetual vigilance is the price of liberty. There always have been and there always will be those who, in a spirit of distrust of popular government, incline toward restrictive and coercive measures. Born in the good old Commonwealth of Delaware, I was reared in a different school of political thought. I cannot share the apprehensions of those who see in freedom of discussion, or in the expression of views different from their own, a revolutionary or subversive menace. What is now commonly called Bolshevism is but the spawn of long years of bureaucratic rule, which, as I have already intimated, unfortunately tends to become self-sufficient and, being unresponsive to needs which it does not comprehend,

naturally degenerates into a system of unintelligent repression. The people of the United States, after a century and a quarter of free government under a Constitution which they have been accustomed to regard as the charter of their liberties, are today in a broad sense still to be reckoned among the world's more conservative peoples. On the other hand, as they have occasionally shown a striking capacity for impulsive action, as well as a susceptibility to the influence of bounties from the public treasury, they should ever bear in mind the solemn admonition, uttered more than a century ago by a great Irish statesman and patriot, John Philpot Curran, that "the condition on which God hath given liberty to man is eternal vigilance." Of similar import is the profound saying of Demosthenes, which the experience of more than two thousand years has verified, that, among the things that constitute an advantage and security to all, but especially to democracies, is a distrust of rulers. Nor will a ruler, who deals honestly with his people, seek to avoid a full and explicit public accounting for his stewardship.

BOOK REVIEW

INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES. *By* CHARLES CHENEY HYDE. Boston, Little, Brown & Company, 1922. Two vols.: I, lix, 832; II, xxvii, 925.

It is difficult within the appropriate limits of a book review to examine comprehensively the results of so much careful labor and conscientious reflection as are manifested in the two substantial volumes whose title has just been given. Especially is this so, because of the fact that, as in the case of Garner's *International Law and the World War*, and the third edition of Oppenheim's *International Law*, edited by Roxburgh, both of which have also appeared since the Armistice of November 11, 1918, the author necessarily deals in many instances with belligerent and other measures so intimately associated with the activities of certain Powers that it is as yet difficult for a writer to exercise that "cold critical faculty" which John Marshall once declared to be essential to the exposition of the law. Nor is this the only difficulty. In each age in which a general war has occurred, there has been a tendency to regard it as the greatest of all wars, and to think of it as having exercised a profounder influence than any previous conflict had ever done on the course of history and even as having wrought a profound change in human nature itself, this tendency being due to the very simple fact that people are more sensible of the conditions in which they actually live than they are of the conditions that existed in the past.

But it is by no means intended to intimate that the author of the present volumes is specially open to comment on this score. His independence and candor are above suspicion. But, when one finds, for instance, in a work on International Law, a suggestion (II, § 813, pp. 626-629) that, as a result of the recent war, the distinction as heretofore made between absolute and "conditional" contraband has been shown to be unsound and should no longer be maintained, one cannot help feeling either that one must oneself be unduly impervious to change, or that recent events have produced a certain obscuration of fundamental principles. The necessity of considering this alternative, in respect of the subject just men-

tioned, is further enforced by a statement in the third edition of Oppenheim,¹ to the effect that, "although till the outbreak of the World War the distinction between absolute and conditional contraband was certainly correct in theory, and of value in practice, the war has shaken its foundation," and even the further statement that the distinction "dates from the time when armies were small, and comprised only a very small fraction of the population of the belligerent countries!" This statement surely would have astonished Grotius; and it must equally astonish those who are familiar with the history, either legal or military, of the wars growing out of the French Revolution and the Napoleonic Wars.

Mr. Hyde does not base his suggestion on similar assumptions, but says that the distinction between "conditional" and absolute contraband springs from "the sense of a need of solid proof that articles regarded within the former category, because capable of employment for purposes both related and unrelated to war, are in fact destined for a hostile use by a belligerent" (II, 626), and, further on (II, 628) that "the right of the belligerent to intercept traffic designed to aid its enemy, and that of neutral shippers to engage in innocent commerce with neutral territory . . . are not at variance with each other." But, one naturally asks, what is meant by "traffic designed to aid" the enemy and by "innocent commerce" with neutral territory? If traffic "designed to aid" the enemy means merchandise merely destined to enemy territory and "innocent commerce" means merchandise intended never to reach enemy territory it is certain that if this test is accepted the distinction between absolute and "conditional" contraband at once disappears and that the "right" to intercept is not at variance with that to trade because the right to trade is abandoned.

The simple truth is that the distinction between what in very recent years has, inaccurately and unfortunately, been styled "conditional contraband," and articles absolutely contraband, never did rest on logic, in the sense that it was imagined that "conditional contraband," which includes food stuffs, was not of military value, potentially even of capital military value, to belligerents. Not to cover a wider range, one need not be at a loss for examples, during the past three hundred years, of situations in which the question of food supply was of capital importance in war. And yet, did anyone at the time ever imagine that foodstuffs imported into a belligerent country were not immediately available for military purposes, or that

1. Oppenheim, *International Law* (3d ed. 1921, by Ronald F. Roxburgh), II, 549.

the government of such country could not or would not take and use for its own purposes all foodstuffs, whether imported or of domestic origin, which it might need? That such a supposition was ever indulged, is altogether incredible. The rule, so forcibly stated by Lord Salisbury during the Boer War, that "foodstuffs, with a hostile destination can be considered contraband of war only if they are supplies for the enemy's forces," and that "it is not sufficient that they are capable of being so used," but that it "must be shown that this was in fact their destination at the time of the seizure," was not framed as a logical reconciliation of the right to trade, with a supposed belligerent right to seize whatever might be used by the enemy for the purposes of the war. If framed in this sense, the rule would have made a laughing stock of logic. In reality the rule represented and has continued to represent not a logical reconciliation of, but a practical compromise between two claims either of which, if carried to its logical conclusion, would have destroyed the other, being in this particular like most other legal rules; and it further represented and represents the advance painfully made, through centuries of struggle, toward greater freedom of commerce in time of war.

Is the recent great war to differ in its effects from previous great wars, in that extraordinary measures which hard pressed belligerents as the struggle grew more intense, adopted generally on the professed ground of retaliation, are to be considered as having changed the established law, and as having created in its stead a system essentially based on the concession of belligerent pretensions? Is there reason to believe that the recent war will differ in this respect from the wars growing out of the French Revolution and the Napoleonic Wars, whose decrees and orders in council were regarded twenty years later only as the passing expedients of a contest desperately waged? Is it more likely now than it was a hundred or two hundred years ago that nations will find their general and continuing interests to be in accord with what they did in an exceptional exigency?

In this relation it is at least interesting to consider the report, signed by the late Sir John Macdonnell, on behalf of the British Maritime Law Committee, August 1, 1919, on the laws of naval warfare. In this report, made even less than a year after the conclusion of the Armistice, we find the distinction between absolute and "conditional" contraband preserved, with a right of "interception and requisition," conditioned upon payment of the value of the merchandise to the owner, substituted for the right of capture, which it is proposed shall be wholly renounced. This is, in effect, in different phrase-

ology, the so-called right of pre-emption asserted in 1794, and previously, in mitigation of, or as a substitute for, the claim of belligerent capture which neutrals so firmly opposed; and it is needless to point out how incomparably more favorable it is, in principle and in practice, to freedom of commerce than the suggestion (II, 627) that a belligerent should "enjoy the right" to "intercept and condemn all articles capable of assisting the enemy," on the mere proof that they were "destined by land or by sea to the domain of the enemy." It is superfluous to point out that the concession to belligerents of a right to "seize and condemn" all articles "capable of assisting the enemy" would mean the virtual end of the right to trade with countries at war; for, by the very terminology of the subject, every article of commerce in the "conditional" list, which embraces the great bulk of articles not distinctively military, is an article "capable of assisting the enemy." Is any government today proposing to go to such a length either in claim or in concession?

In many places, indeed almost habitually, Mr. Hyde speaks of the practice of "enlightened" states. Writers formerly dealt with international law as a system maintained by and binding upon "Christian" states. This was at least intelligible; but after the Congress of Paris Treaty of 1856, by which the Ottoman Empire was declared to be admitted to the benefits of the public law and concert of Europe, the appropriateness of the term was questioned, and, after the admission of certain Far Eastern powers, and particularly of Japan, to what Hall called the "circle of law-governed nations," the term had to be abandoned. Would it be possible to make a classification for the purposes of international law, either scientific or practical, of "enlightened" states? Upwards of thirty years ago T. J. Lawrence fancied that he had discovered in the "hegemony" of the "Great Powers" a source and assurance of international order and international peace. When we consider the subsequent fortunes of the select combination he then had in mind, it can scarcely be claimed that this contribution to scientific thought has proved to be of enduring value. Personally, I confess that I cannot at the moment suggest any classification, scientific or practical, other than that which has heretofore generally been accepted, of States that avowedly acknowledge and of those that do not avowedly acknowledge, the authority and the obligation of international law as a whole, even though they may not all agree as to the existence or the interpretation of certain rules. It would not be difficult to point out contributions to advanced modern international practice, such, for instance, as that of the exemption from

immediate confiscation of enemy merchantmen in port at the outbreak of war, made by States not instinctively envisaged by the citizens of "Great Powers" as "enlightened."

In calling attention to considerations of this kind, I am far from intending to detract from the value of what the author has done or from the credit due for what he has accomplished. It is with the greatest satisfaction that I commend his example and his standards, and the ends which he has sedulously sought to attain. The fact that such a work has lately been produced may, I trust, be received as a proof that the supposition, so prevalent since 1914, that international law has ceased to exist, is altogether hasty and unadvised.

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THE PERMANENT COURT OF INTERNATIONAL JUSTICE¹

SOME years ago there was a popular divine, a well-known orator, who spoke on Mondays at Tremont Temple in Boston, and who was accustomed to divide his discourse into two parts, the first of which he called the prelude, the other being the main body of the discourse. I had thought of following this plan today, but I was informed that I was to be "broadcasted" by radio, and that I must begin at a certain moment and end at a certain moment, being in this regard in a situation somewhat similar to that of the minstrel who said that he was "shanghaied." But, like the minstrel, I do not feel at all unhappy about it. On the contrary, I am very cheerful, as the radio, besides causing me to observe certain limits of time, will have the effect of confining my remarks to a single subject; for I know you will expect me to say something about the Court in which I have the honor to be a judge.

Judge Finch has, in the enthusiasm of friendship, ascribed to me a larger and more important part than I deserve in bringing about or establishing the practice which has been pursued by the Permanent Court of International Justice in hearing cases and in rendering its judgments. The rules of the

1. Address delivered as a part of the general Alumni Day program at Columbia University, February 12, 1924. Reprinted from the *Columbia Alumni News*, Vol. XV, No. 20 (February 29, 1924); *International Conciliation*, No. 197 (April, 1924); *Contemporary Speeches*, compiled by James M. O'Neill and Floyd K. Riley (New York and London, The Century Company, 1930), pp. 241-252.

Court require the utmost publicity in all such matters, and not only publicity, but the ordinary judicial procedure as we know it, with notice to all parties and an opportunity to be heard, and these rules were severally adopted by the Court either unanimously or by a majority usually approaching unanimity.

TWO COURTS AT THE HAGUE

At the outset I think it is desirable to explain the relation of what is called the Permanent Court of International Justice and the Permanent Court of Arbitration. There are two Courts at The Hague, one called the Permanent Court of Arbitration, and the other the Permanent Court of International Justice. The Permanent Court of Arbitration was established under The Hague Convention of 1899, called the Convention for the Pacific Settlement of International Disputes. Under this Convention there was created what was called the Permanent Court of Arbitration, but this was not a Court in the sense in which the term is generally understood. It was provided by the Convention that each contracting party might appoint not more than four representatives, who should be called Members of the Court; and that, where a dispute was submitted for adjudication, a tribunal for the hearing and decision of the case should be appointed, preferably from among the so-called Members of the Court. After the governments made their appointments, there were in all more than one hundred and twenty of these Members.

PERMANENT COURT OF ARBITRATION

The Permanent Court of Arbitration has heard and determined a number of cases, and has performed in fact a very useful part. Only the other evening some one made to me the remark that the reputation of the Permanent Court of Arbitration had been very much injured by reason of the fact that it did not prevent the war of 1914. My reply was simply this: That, if we are to apply that test, we must begin by abolishing the Supreme Court of the United States, because the Supreme Court of the United States not only did not prevent the Civil War in the United States, but by the decision it rendered or the opinion it gave in the Dred Scott case, materially contributed to the bringing on of the conflict. In other words, we can not test the value of an institution by its capacity to recreate human nature overnight. There is the difficulty. Because we can not recreate human nature overnight, we do not proceed to abolish all legislative, administrative and judicial institutions. Those institutions, legislative, administrative and judicial, are the instrumentalities that enable us to carry on gov-

ernment and to avoid the constant recurrence of that awful thing called anarchy.

NOT A TRIAL COURT

The creation of the Permanent Court of Arbitration failed in some respects to satisfy many of those who had been advocating the establishment of a permanent International Court. One of the reasons why it failed to satisfy them, and I think the main reason, was that it was not a Court in the ordinary sense. It was only a panel or eligible list from which, if a controversy was submitted, a tribunal of usually three or five persons was appointed for the purpose of trying the issues and rendering a decision upon them. Consequently, the agitation continued for the establishment of an actual court with a fixed personnel, which should always be open to suitors.

AGITATION FOR AN ACTUAL COURT

The question of creating such a court was considered by the second Peace Conference at The Hague in 1907, and a plan was presented under the title of the "Permanent Court of Arbitral Justice." The Conference, after considering the plan, gave it its general approval, but was unable to adopt it because no plan could be agreed upon for the appointment of Judges. There was a discussion in the second Peace Conference at The Hague on this question. In the plan as submitted, there was a great preponderance given to what we call the great powers, and the smaller powers felt that under the plan proposed they would have no opportunity to make themselves heard or felt. Consequently the whole question had to be postponed because an agreement could not be reached on that subject.

PERMANENT COURT OF INTERNATIONAL JUSTICE

During the peace negotiations at Paris in 1919, while the subject of the League of Nations was under consideration, a telegram was sent from the Bar Association of the City of New York, recommending that the Committee which was drawing up the plan for the League should formulate and incorporate in the plan a provision for a Permanent Court of International Justice. Now I am not able to say whether this was the actual cause of the insertion in the Covenant of the League of Nations of a stipulation for the creation of such a court, but the fact seems to be admitted that it was after the receipt of the telegram that such a clause was inserted in the Covenant. That clause appears in Article 14 of the Covenant, which provides that the Council of the League shall prepare a plan for a Permanent Court of International Justice, which

shall have power to hear and determine such questions as are submitted to it, and which may also give advisory opinions on questions submitted by the Council or the Assembly of the League.

When the Council of the League came to carry out the provisions of Article 14, it decided to entrust the task of preparing a plan to an international committee, to be composed of eminent jurists from the various countries of the world. Such a committee was actually constituted under the title of the Advisory Committee of Jurists, and of that Committee Mr. Root was a member.

COMMITTEE OF JURISTS: WORK AND DETAILS

The Committee sat for nearly two months at The Hague, in the summer of 1920, and drew up a plan. This plan was reported to the Council, which, after full consideration, modified it, especially in one of its provisions. The plan as originally prepared by the Advisory Committee of Jurists proposed to make the jurisdiction of the Court compulsory or obligatory as regarded certain classes of questions which were deemed to be of a legal nature. The Council, on considering this feature of the plan, decided that the Committee had exceeded its powers, Article 14 of the Covenant having described the proposed court as one that was to have power to decide all questions which the parties submitted to it. This was taken to mean that the submission was to be voluntary; and the plan was modified accordingly, with a proviso, however, that powers willing to accept the compulsory jurisdiction might do so by making a special declaration to that effect.

THE PLAN ACCEPTED

The Council, after amending the draft, submitted it to the Assembly; and the Assembly appointed a committee to examine the amended draft and report upon it. This committee was composed of very competent men. It carefully went over the amended draft and incorporated certain changes in it; and, when the work of the committee was completed, the Assembly voted upon the revised draft and unanimously adopted it. The act thus passed is called the Statute of the Court. It is the Court's fundamental charter, and has become effective, not only by virtue of the terms of the Covenant, but by virtue of the signature and ratification of an independent protocol or convention.

Under the Statute the Permanent Court of International Justice consists of fifteen members, eleven of whom are judges, and four of whom are deputy judges. Candidates for member-

ship are nominated by the various national groups in the Permanent Court of Arbitration, which has not been displaced; and the election is made, from a list of these nominees, by the concurrent votes of absolute majorities of the Council and the Assembly, sitting and voting independently. The function of the deputy judges is to take the place of judges who may be absent. The full Court, as a trial body, consists primarily of the eleven judges; but, if a judge is unable to be present, then a deputy is called to take his place. Nine members may constitute a quorum for ordinary business.

The first election of judges and of deputy judges was made in September, 1921, and, soon after the election, the judges of the Court were summoned to meet at The Hague, in special session, for the purpose of organizing the Court. By the Statute, The Hague is the meeting place and not Geneva. Geneva, as you know, is the seat of the League, but by the Statute The Hague is the seat of the Court. So the Court was summoned to assemble at The Hague for the purpose of organizing. The members of the Court first met at The Hague on the 30th of January, 1922; and after a preliminary organization was effected, there was a formal opening of the Court on the 15th of February, 1922.

PERSONNEL OF THE COURT

Now I will say something of the Court's personnel which is naturally a subject of interest; and I will take the judges in the order of age, except myself—I will put myself last, not as the youngest, but for other reasons.

First, there is Lord Finlay. Lord Finlay will be eighty-two years old in July next, but, if you were to see him and talk with him, you would not suspect it. I received from him only three days ago a copy of an address that he had just delivered at Edinburgh on the importance of classical education. He made the address on the occasion of his election as President of the Scottish Association for the Encouragement of Classical Studies. He is a native of Scotland, and an enthusiastic student of Scotch history and literature as well as of the ancient classics. He has had a most distinguished career. When in active practice, he was the recognized leader of the English Bar. He was then made Attorney General, and later was appointed to the office of Lord Chancellor. He represented, by the way, the British Government in the North Atlantic Fisheries Arbitration before the Permanent Court of Arbitration at The Hague, in 1910.

Mr. Root represented the United States in the same litigation.

After Lord Finlay comes Mr. Loder, the President of the Court. The Statute requires the President of the Court to live at The Hague, but I do not mean to say that Mr. Loder was elected President of the Court because he lived at The Hague; but it was convenient for him to remain there, although at the moment I believe he is in Egypt. Mr. Loder has had a most distinguished career. He was one of the founders of the International Maritime Committee in 1896. He has been a member of various International conferences. He was a member of the Supreme Court of The Netherlands.

Next comes, or did come, Mr. Ruy Barboza, of Brazil. He was one of the most eminent of Brazilian statesmen and lawyers, but he died in February of last year, and there was chosen to succeed him, in September last, Mr. Epitacio Pessoa, lately President of Brazil, who had previously been Minister of Justice, as well as a member of the Federal Supreme Court. He is eminent as a lawyer and as a jurist.

Then comes, in the order of age, Mr. Nyholm, of Denmark, a member of the Council of State of Denmark. He was, at the time of his election to the Permanent Court, a judge of the International Court of Cairo, of which he had been Vice-President since 1916.

Next in order is M. André Weiss, who was elected Vice-President of the Court. I may remark that the Court elects its own President and Vice-President. M. Weiss is a member of the Institute of France. He was Professor of International Law at the University of Paris, and is the author of a number of treatises on private international law.

Following Mr. Weiss, is Mr. de Bustamante, dean of the Havana bar, professor of international law at the University of Havana, eminent as a practitioner, statesman, diplomatist and author.

Likewise of Spanish stock is Mr. Altamira, of Spain; a Spanish Senator, a professor at the University of Madrid, and president of the Ibero-American Institute of Comparative Law.

Then comes a Judge from Japan, Dr. Oda, Professor of International Law at the University of Kyoto, of which he is also Rector. He made a special study some years ago of the usages, manners and laws of China.

There is also a Judge from Italy, Mr. Anzilotti, who is Professor of International Law at the University of Rome, Jurisconsult to the Ministry of Foreign Affairs, and editor of that well known publication *Revista di Diritto Internazionale*, one of the best periodicals on international law in the world.

The youngest of the Judges, Dr. Max Huber, is from Switzerland. Dr. Huber, while honorary Professor of International

Law at Zurich, is jurisconsult to the Swiss Government in matters of foreign affairs. He was the Swiss Government's delegate to the Second Peace Conference at The Hague, in 1907, and he represented Switzerland at the Peace Conference in Paris, in 1919. He is the author of numerous works.

For information concerning myself, I will refer the inquirer to *Who's Who*.

A majority of the judges of the Permanent Court of International Justice are also members of the Permanent Court of Arbitration.

Of the four deputy-judges, the oldest is Mr. Yovanovitch of Serbia. He is President of the Supreme Court of Appeals of Serbia, and a well known authority on Serbian Law, on which he has written numerous works.

Mr. Beichmann, the next deputy-judge, is President of the Court of Appeals of Trondhjem, Norway. He was President not long ago of the Arbitration Commission for the settlement of certain claims against Morocco, and still later served as the President of the Arbitral Commission on the case of what is known as the Jaffa and Jerusalem Railway.

Then there is Mr. Negulesco, of Roumania, who is a professor at the University at Bucharest. He was a member of the Committee of the Assembly which revised and reported the Statute.

The youngest deputy is Dr. Wang, of China. He is a graduate of Yale University. After his graduation he studied law for nearly four years in England. Subsequently he studied law nearly five years in Germany, and made a translation into English of the German Civil Code, which drove out of the market an English translation previously made by a person whose native tongue was English. He was Minister of Foreign Affairs in the Provisional Government at Nanking, and was appointed President of the Commission to draw up Codes of Law for China.

SALARY OF THE JUDGES

As to the pay of the Judges, I may say that it is a subject that I can mention without embarrassment. Our pay is not so high as to justify the imputation of mercenary motives. The salaries are paid in Dutch florins. Assuming that the florin is at par, which at present it is not, we would receive salaries of about \$6,000 a year. But we get something in addition, in the form of a per diem while we are actually sitting. This is called a duty-allowance; and we also receive a smaller per diem as a subsistence allowance. The President of the Court, in order to support the dignity of his office, receives a special allowance.

A Judge may possibly get as much as \$12,000 in one year, but in order to do so he must sit about seven months out of the year.

TWO OFFICIAL LANGUAGES

A question is often asked as to the languages used in the Court. The Court has two official languages, English and French, which are used in all our proceedings. The hearings are in English and French, and all Opinions are rendered and all decisions given in both languages. The Statute authorizes the Court in certain cases to permit other languages to be used. That power has already been exercised, where it was evident that counsel could not adequately present their arguments unless they were permitted to use their own tongue; but, so far, counsel have in such cases been required eventually to file an official version of their argument in either French or English, as well as in the language orally used.

THE QUESTION OF NATIONALITY OF JUDGES

I have said that there are fifteen members of the Court, and that the full Court, sitting as a Trial Court, consists of eleven members; of the eleven Judges, if they can all be present, and, if not, of Judges and Deputy-Judges sufficient to make up the number. In case of necessity, nine may constitute a quorum. But there is one case in which the full Court may consist of more than eleven judges, and that is where a Nation, appearing as a suitor, has none of its citizens on the bench. Now, the Judges are not elected as citizens of any particular country. The Statute specifically provides that they shall be elected without regard to their nationality, but that in their selection regard shall be paid to the different legal systems of the world. But, when the drafting of the Statute was in progress, a question naturally was raised as to whether a Judge should be disqualified on grounds of interest if his country happened to be one of the litigants. After mature reflection, it was decided, and most wisely decided, that, instead of disqualifying a Judge because his country was a litigant, the right should be given to the unrepresented country to name a Judge to be added to the Court. Only those who have had experience in international business can fully comprehend the importance of this decision. The great doubt that Nations feel when they go before tribunals or into international conferences is that their case may not be fully understood, because they may be unable to convey to the minds of persons of a different nationality the ideas they have in their own minds. When we come to study languages

and to examine them very closely, we find that every language expresses phases of thought which are not readily or precisely conveyed in the words of any other language, and it requires careful analysis and interpretation to effect correct and adequate interchanges of meaning in such cases. A Nation feels an additional assurance that its views will be understood when one of its own nationals takes part in all the deliberations of the tribunal, private as well as public.

The right to name a national Judge was actually exercised by Germany in the Wimbledon Case, in which Germany was one of the parties. As there was no German on the Court, the German Government, exercising its right under the Statute, designated, as its national Judge, Dr. Walter Schücking, of Berlin, so that in this case there were twelve Judges instead of eleven. There might, of course, for the same reason, be thirteen or fourteen, or even more.

ACTUAL WORK OF THE COURT

Although I may be in danger of exceeding the limit fixed for the broadcasting of what I may say, I desire to speak briefly of the work of the Court. The Court has rendered eight advisory opinions, and pronounced one judgment. The judgment was rendered in the case of Wimbledon, which related to the status and use of the Kiel Canal under certain provisions of the Treaty of Peace of Versailles of 1919. The first of the advisory opinions related to the legality of the appointment by The Netherlands government of what is called its Workers' Delegate to the Second International Labor Conference. The second advisory opinion related to the question whether the international labor organization had anything to do with international regulation of agricultural labor. The third question was allied to the second.

The fourth question, while it was submitted with a request for an advisory opinion, essentially involved an international dispute which was submitted to the Court for its determination. A dispute arose between France and Great Britain as to the validity, in an international sense, of certain decrees that had been issued by the French Government in Tunis and in the French zone in Morocco, and also by the local governments, in relation to the nationality of certain resident foreigners. The British Government contested the validity of the decrees in the international sense, on the ground that they exceeded the powers of a protecting state, and secondly, on the ground that they violated the treaties between the two countries. The dispute was brought before the Council of the League of Nations, but, relying on a clause in the Covenant, France

contested the jurisdiction of the Council on the ground that the question involved was one purely of domestic jurisdiction, concerning only the protecting and the protected power. The Council did not undertake to determine this question. On the contrary, it held the question in abeyance, and, while it was so doing, the British and French Governments came to an agreement under which the Council was to submit the question to the Court for an advisory opinion, it being further stipulated that, if the Court should hold that the matter was not one of exclusive domestic competence, then the two powers would submit the whole dispute for final judicial or arbitral decision on the merits. Thus, while there was in form a request for an advisory opinion, the parties agreed to accept the Court's opinion as a binding decision of the preliminary question. This went beyond the implications of an "advisory opinion." An advisory opinion is not necessarily conclusive. There is an implication that the parties are not legally bound to follow it. But, in the Tunisian and Moroccan case, the parties had agreed to accept it.

I am exceeding my time, and fear that I am deranging the radio, but I do want to say something about the opinion of the Court in the Eastern Carelian case, which relates to a territory lying between Finland and Russia. This territory was dealt with in a Treaty of Peace between Finland and Russia, but disputes subsequently arose as to the interpretation and obligation of the Treaty. The matter was brought by Finland before the Council of the League of Nations. Russia was not a member of the League. The Council therefore hesitated to deal with the matter. Eventually a resolution was adopted to the effect that it would be agreeable to the Council if some power in diplomatic relations with Russia would suggest to Russia the submission of the matter to the League. Such a suggestion was made, but the Russian Government repulsed it and declined to accept the interposition of the League. The matter was then brought back to the Council, and the Council eventually sent it to the Court with a request for an advisory opinion on the basis of proofs or representations which, as the request said, the parties might equally submit.

When the request was received by the Court, the parties, including Russia, were notified, but again Russia peremptorily refused to submit. The Court, therefore, found itself face to face with the question whether it would undertake to give an advisory opinion on a dispute between two countries where one of the countries refused to join in the submission to the Court. In other words, would the Court, whose jurisdiction of international disputes depends on the common consent of the

parties, undertake to dispense with that condition, by giving to its *ex parte* opinion an advisory form.

This question was argued, and the Court, after full consideration, reached the conclusion, which it explained in a fully reasoned opinion, that it could not give an advisory opinion on the question submitted to it.

What was done in this case plainly shows that the Court has acted as an independent judicial body; but, when I say this, I do not want the inference to be drawn that the Court understood itself to be resisting any pressure whatsoever in the matter. There was none. The very language of the request for our advisory opinion indicated that it was originally contemplated by the Council that the Russian Government should be notified and that representations should be equally submitted by the parties.

But I desire to make a further observation. Much has been said of the relation of the Court to the League; and the statement often is made that it is the League's Court, which in a certain sense is true; and that it derives its support from the funds of the League, which is undoubtedly true. But I do not know of such a thing in this world as a self-supporting Court. It would place a court in a very unfortunate position to compel it to rely for its support on chance contributions by litigants. We do not consider that our Courts lack independence because they are dependent upon legislative appropriations. The Supreme Court of the United States would have to abandon its labors, if the Congress should fail to appropriate money for the salaries of the Judges; but the Court, with cheerful confidence, continues to declare acts of Congress to be invalid where, in the Court's opinion, they are not consistent with the Constitution.

I have but one more word to add. At the formal opening of the Court on the 15th of February, 1922, at which various governments were represented, the League naturally was also represented. Its representative was Sir Eric Drummond, its Secretary-General. Addresses were made, characterized by eloquence and deep feeling; and in the excellent speech delivered by Sir Eric Drummond the point emphasized above all others was the fact that the nations concerned were engaged in setting up a Court which was to be absolutely independent and free from all control or pressure in the performance of its duties, precisely as is any National Court. In refraining, therefore, from expressing an opinion on the merits of the dispute in the Eastern Carelian Case, the Court did not suppose that it was offending anybody, nor has it since had reason to suspect anything of the kind, as requests for advisory opinions continue to come.

